Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

QWEST COMMUNICATIONS INTERNATIONAL INC.,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

TERENCE C. GILL
SHERMAN & HOWARD, LLC
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

JONATHAN D. SCHILLER
DAVID R. BOYD
Counsel of Record
ALFRED P. LEVITT
KENNETH F. ROSSMAN, IV
TRICIA J. BLOOMER
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015
(202) 237-2727

September 6, 2006

Attorneys for Petitioner,
Qwest Communications International Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether production of privileged documents to federal law enforcement authorities in the course of federal investigations and pursuant to written confidentiality agreements waives the attorney-client privilege and the protections afforded to attorney work product with respect to private litigants in separate proceedings.

PARTIES TO PROCEEDINGS BELOW

The parties to the litigation in the district court include Lead Plaintiffs New England Health Care Employees Pension Fund, Clifford Mosher, Tejinder Singh, and Satpal Singh, each suing as a putative representative of a class of shareholders who purchased securities of Qwest Communications International Inc. ("Qwest" or the "Company"). Defendants in the district court are Qwest, Arthur Andersen LLP, Philip F. Anschutz, Joseph P. Nacchio, Robin R. Szeliga, Robert S. Woodruff, Drake S. Tempest, James A. Smith, and Craig D. Slater.

Qwest was the only petitioner in the proceeding before the United States Court of Appeals for the Tenth Circuit that is the basis for this petition for writ of certiorari. Each of the Lead Plaintiffs in the district court was a respondent in the court of appeals.

RULE 29.6 STATEMENT

The securities of Qwest Communications International Inc. are publicly traded. Qwest believes that Legg Mason, Inc. (through various wholly owned subsidiaries) owns 10% or more of its securities.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 450 F.3d 1179, and is reproduced at App. 1a-40a. The decisions of the district court that are relevant to the issue presented by this petition—*see In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, No. 1:01-CV-01451 REB-PAC, Docket No. 778 (D. Colo. Aug. 15, 2005) (order granting in part and denying in part Lead Plaintiffs' motion to compel), and *id.*, Docket No. 923 (D. Colo. Feb. 2, 2006) (order granting in part and denying in part Qwest's motion to reconsider and certify)—are not published. Those opinions are reproduced at App. 41a-50a and App. 51a-55a, respectively.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its decision on June 19, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Tenth Circuit's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

This petition calls for the application of Rule 501 of the Federal Rules of Evidence, which provides:

> Except as otherwise required by the Constitution of the United States or provided by an Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

Also relevant is Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's

> case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Rule 26 of the Federal Rules of Civil Procedure is reproduced in its entirety at App. 56a-67a.

STATEMENT OF THE CASE

A. The Federal Investigations And Qwest's Disclosure Of Privileged Materials Pursuant To Written Confidentiality Agreements.

In early 2002, the Securities and Exchange Commission ("SEC") began an informal investigation of Qwest's accounting practices and requested that Qwest produce specified categories of documents. The SEC converted its informal investigation into a formal investigation in early March of 2002 and began to issue subpoenas for documents. In early July of 2002, the Department of Justice ("DOJ") informed Qwest that it had begun an investigation as well.

By the time of these initial contacts from the SEC and DOJ, Qwest was embroiled in civil litigation that would ultimately involve many of the same issues that were the subjects of the government investigations. In July of 2001, a pension fund filed the first of numerous federal securities class action complaints against Qwest and certain individual defendants. *New England Health Care Employees Pension Fund v. Qwest Commc'ns Int'l Inc.*, No. 1:01-CV-01451 REB-PAC, Docket No. 1 (D. Colo. July 27, 2001). This case was later consolidated with subsequently filed putative class actions in the United States District Court for the District of Colorado and re-designated *In re Qwest Communications*

International Inc. Securities Litigation. New England Health, No. 1:01-CV-01451 REB-PAC, Docket No. 9 (D. Colo. Sept. 12, 2001) (order consolidating putative class actions).[1] Seven individual private securities cases were also filed against Qwest and others after the Company's announcement of the SEC and DOJ inquiries and six more in 2006, following the announcement of a partial settlement of the consolidated securities class action.[2]

Qwest initially declined to produce documents to the SEC and DOJ protected by the attorney-client privilege and the work product doctrine. However, in order to be viewed by the SEC and DOJ as cooperating in their investigations, the

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[1] Federal jurisdiction over the consolidated securities class action is conferred pursuant to § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and § 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a).

[2] On October 31, 2005, Lead Plaintiffs in the consolidated securities class action announced a settlement with Qwest and some of the defendants on behalf of the putative class in *In re Qwest*. After preliminarily approving that partial settlement, the Honorable Robert E. Blackburn of the United States District Court for the District of Colorado conducted a fairness hearing to consider the partial settlement, and his final decision on the proposed partial settlement is pending.

The district court's approval of the partial settlement in *In re Qwest* will not moot the issue presented by this Petition, since the Lead Plaintiffs have indicated that they will continue to seek production of the documents at issue for possible use in the continuing litigation against the non-settling defendants in that case. The Lead Plaintiffs agreed to an unopposed motion in the district court, seeking to stay production of any Limited Waiver Material (as defined on p. 5, *infra*) until proceedings in this Court conclude, however, and the Honorable Richard A. Kramer of the California Superior Court has deferred his consideration of a motion to compel the production of the Limited Waiver Material in a related case, *Cal. State Teachers Ret. Sys. v. Qwest Commc'ns Int'l Inc. et al.*, No. 415546 (Super. Ct. Cal.), pending the resolution of this Petition as well. As a result, Qwest has not produced any Limited Waiver Material in this or any related civil litigation.

Company eventually agreed to produce certain privileged material. It did so only after the SEC and DOJ separately agreed in writing that they would not disclose these documents except as required by law or in the discharge of their duties and responsibilities, and that they would not argue that Qwest's production of the documents formed the basis for a waiver as to any third party. *See* February 11, 2003 Letter from William R. McLucas to Randall J. Fons (App. 68a-69a); February 10, 2003 Letter from Harold A. Haddon to William J. Leone (App. 70a-72a).

Pursuant to these and subsequent written confidentiality agreements with the government, Qwest produced the documents (the "Limited Waiver Material") at issue in this Petition. Throughout these proceedings, no party has ever disputed that, but for the production to the government, the Limited Waiver Material is subject to valid claims of privilege, and the holdings of the district court and court of appeals do not question Qwest's valid claims of privilege absent its production of the Limited Waiver Material to the government.

B. Summary Of Proceedings Leading To This Petition.

On February 28, 2005, Lead Plaintiffs in *In re Qwest* moved to compel production of the Limited Waiver Material. After initially referring that motion to a United States Magistrate Judge, on August 15, 2005, the district court ordered Qwest to produce all of the Limited Waiver Material, with one exception (the "August 15, 2005 Order"). (App. 49a-50a) The exception related to "opinion work product" found in a limited number of memoranda prepared by Qwest's litigation counsel that the district court instructed Qwest to redact before production. (App. 49a-50a)

Qwest sought reconsideration of the portion of the district court's August 15, 2005 Order requiring production of the

opinion work product contained in the remaining Limited Waiver Material and requested that the district court certify its August 15, 2005 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On February 2, 2006, the district court granted in part and denied in part Qwest's motion to reconsider and certify. (App. 54a-55a) The court held that Qwest had not waived "opinion work product" protections with respect to any of the Limited Waiver Material and thus instructed Qwest to redact "opinion work product" from all of the Limited Waiver Material prior to its production. (App. 52a)[3] The court refused to certify the August 15, 2005 Order for interlocutory appeal, however. (App. 53a-54a)

Qwest then sought further review in the Tenth Circuit by writ of mandamus. The court of appeals determined that it was appropriate to consider the merits of Qwest's position and acknowledged that the question Qwest presented "is of considerable public interest." (App. 7a) The Tenth Circuit also seemed to accept the Sixth Circuit's judgment that the limited waiver principle Qwest advocated "would further the search for truth, realize considerable investigative efficiencies, encourage settlements, and possibly increase corporate self-policing" (App. 25a (citing *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002), *cert. dismissed sub nom, HCA, Inc. v. Tenn. Laborers Health and Welfare Fund*, 539 U.S. 977

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[3] The court of appeals did not review the district court's ruling that "opinion" work product had not been waived and, accordingly, that issue is not presented by this Petition. However, since courts commonly recognize that "opinion" work product is afforded even greater protections than "fact" work product, *see, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 400-02 (1981), the limited waiver rule that Qwest urges to protect "fact" work product would, as a practical matter, protect "opinion" work product as well. On the other hand, even if fact work product were waived by production to the government under the circumstances presented in this case, the district court correctly concluded that it does not follow that opinion work product would also be waived.

(2003))), but concluded that "the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material" (App. 24a). It therefore declined to issue a writ of mandamus and allowed to stand the district court decision compelling production of the documents at issue.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING AN ISSUE OF SIGNIFICANT IMPORTANCE TO LAW ENFORCEMENT AUTHORITIES AND LITIGANTS.

More than a dozen years ago, the federal district court in Colorado characterized the law of limited waiver as an area of "hopeless confusion." *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993). After reviewing the state of the law more recently, the Sixth Circuit voiced that same assessment. *See In re Columbia/HCA Healthcare*, 293 F.3d at 295. In fact, the confusion is so profound that it is difficult even to describe all of the various positions established by the federal courts.

The Eighth Circuit stands at one end of the spectrum with its *en banc* decision in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (*en banc*), which held that the production of privileged documents to the SEC resulted in a waiver of the attorney-client privilege only with respect to that agency, even absent a confidentiality agreement between the producing party and the SEC. *Id.* at 611. At the other end of the spectrum stand the Tenth and Sixth Circuits, each of which has held that both the attorney-client privilege and at least some work product protections are waived by production of documents to law enforcement agencies, even where the producing party has obtained written confidentiality agreements with those agencies. *See In re Qwest*, App. 26a-

28a; *In re Columbia/HCA Healthcare*, 293 F.3d at 302-07. *But see id.* at 307-14 (Boggs, J., dissenting). And even those two decisions differ in the scope of their analysis.

Between these two extremes lies a vast range of confusion that makes it difficult to determine where some of the other circuits stand on the issue.[4] For example, the Tenth Circuit reads Second Circuit law to be consistent with its own in rejecting the possibility of a limited waiver of attorney-client privilege based on an agreement between law enforcement agencies and the producing party (App. 15a), but acknowledges that the Second Circuit seems to have left room for a limited waiver of work product protections under similar circumstances (App. 22a-23a). The Sixth Circuit, by contrast, reads the Second Circuit's opinion in *In re Steinhardt Partners, LP*, 9 F.3d 230 (2d Cir. 1993), to acknowledge that any waiver may be avoided through an appropriate agreement between the producing party and the government. *See In re Columbia/HCA Healthcare,* 293 F.3d at 300-01 (discussing *Steinhardt*). In fact, three district courts in the Second Circuit have relied on *Steinhardt Partners* to find no waiver of attorney-client privilege or work product protections when adequate agreements between law enforcement agencies and the producing parties are demonstrated. *See In re Natural Gas Commodity Litig.*, Civ. A. No. 03-6186VMAJP, 2005

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[4] The confusion also extends to the terminology used in the various courts of appeals. In *Diversified,* the Eighth Circuit employed the term "limited waiver" to describe its holding that production of privileged documents to the SEC did not waive applicable privileges with respect to other parties. *Diversified*, 572 F.2d at 611. The Sixth and the Tenth Circuits, however, have described this same argument as one of "selective waiver" rather than "limited waiver." *In re Qwest*, App. 2a-3a; *In re Columbia/HCA Healthcare*, 293 F.3d at 295, n.5 (quoting *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423, n.7 (3d Cir. 1991)) (additional citations omitted). Like the court in *Diversified*, Qwest has characterized its position as one of "limited waiver" in the proceedings below and it does so in this Petition as well.

WL 1457666, at ** 5-9 (S.D.N.Y. June 21, 2005) (magistrate judge opinion addressing work product protections), *aff'd*, Civ. A. No. 03-6186VMAJP, Docket No. 369 (S.D.N.Y. Dec. 2, 2005); *Maruzen Co. v. HSBC USA, Inc.*, Civ. A. Nos. 00-1079-RO, 00-1512-RO, 2002 WL 1628782, at ** 1-2 (S.D.N.Y. July 23, 2002) (addressing work product protections); *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (addressing attorney-client privilege).[5]

Similarly, although the Tenth Circuit reads First Circuit law to support rejection of a limited waiver concept (App. 15a (citing *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 682 (1st Cir. 1997))), the Sixth Circuit interprets the First Circuit as having "left the door open to selective waiver conditioned on the presence of a confidentiality agreement," *In re Columbia/HCA Healthcare,* 293 F.3d at 301 (citing *United States v. Billmyer*, 57 F.3d 31, 37 (1st Cir. 1995)); *see also In re Keeper of Records*, 348 F.3d 16, 28 (1st Cir. 2003) (reservations against waiver of privileges in presenting information to the government were "fully effective").

This confusion is compounded by the fact that a number of appellate decisions commonly cited in discussions of this area of law have addressed the issue in cases that did not involve written agreements between the producing party and law enforcement agencies, or in contexts that were markedly different than the facts presented in this case and *In re Columbia/HCA Healthcare.* For example, both the D.C.

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[5] The Reporter to the Advisory Committee appears to agree with the Sixth Circuit's interpretation of *Steinhardt Partners* as a case that leaves open the possibility of selective waiver of both attorney-client privilege and work product protection where a confidentiality agreement exists between the parties. *See* Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to Advisory Committee on Evidence Rules, at 15-16 (Mar. 22, 2006) (on file with the Advisory Committee on Evidence Rules).

Circuit's decision in *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), and the Third Circuit's ruling in *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), were decided in cases where no written agreement had been reached between the producing party and law enforcement authorities regarding limitations on waiver as to third parties. *See Permian*, 665 F.2d at 1217; *Westinghouse*, 951 F.2d at 1417-18, 1427. Nonetheless, both are cited as decisions that foreclose the possibility of limited waiver in their respective circuits. *See, e.g., In re Qwest*, App. 14a-15a; *In re Columbia/HCA Healthcare*, 293 F.3d at 295.[6] In fact, however, in a post-*Permian* case, the D.C. Circuit indicated its willingness to find limited waivers in circumstances similar to the instant case—where explicit written confidentiality agreements with government agencies exist, noting that the policy objectives of the *Diversified* court can be accomplished if the "SEC or any other government agency . . . expressly agree[s] to any limits on disclosure to other agencies consistent with their responsibilities under law." *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982). The Seventh Circuit has also endorsed the idea that a finding of limited waiver might be appropriate under the circumstances present here. *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (noting that other courts' rejection of limited waiver was due, in part, to the fact that they feel—"reasonably enough"—"that the possessor of the privileged information should have been more careful, as

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[6] Similarly, the First Circuit's decision in *Massachusetts Institute of Technology*, 129 F.3d 681 – cited by the court in *In re Qwest* as evidence of that circuit's hostility toward limited waiver (App. 15a)—did not involve any written limited waiver agreement. Indeed, that case involved an attempt by MIT to refuse to produce to the IRS information that it previously had provided to another agency of the government. *See* 129 F.3d at 683. Thus, *Massachusetts Institute of Technology* does not invoke the same considerations as those presented by cases like this one.

by obtaining an agreement by the person to whom they made the disclosure not to spread it further").

In short, the decisions of the federal courts of appeals offer a kaleidoscope of different approaches and different outcomes to the question posed by this Petition. The law continues in a state of "hopeless confusion," more than a dozen years after the observation of the Colorado district court in *In re M & L Business Machine Co.*, 161 B.R. at 696.

II. PRODUCTION OF PRIVILEGED DOCUMENTS TO LAW ENFORCEMENT AGENCIES SUBJECT TO WRITTEN AGREEMENTS LIMITING THE RESULTING WAIVER SHOULD NOT CONSTITUTE A BROAD WAIVER OF PRIVILEGE PROTECTIONS.

Rule 501 of the Federal Rules of Evidence dictates that testimonial privileges in the federal courts should be "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." As this Court has recognized, Congress enacted Rule 501 to afford federal courts "the flexibility to develop rules of privilege on a case-by-case basis" and to "leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 46 (1980) (quoting 120 Cong. Rec. 40891 (1974) and citing S. Rep. No. 93-1277, at 11 (1974)).[7]

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[7] In 1972, the Chief Justice transmitted to Congress proposed Rules of Evidence formulated by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and this Court. Those proposed rules would have established nine specific testimonial privileges. Congress rejected that recommendation in favor of the current Rule 501, however, which acknowledges the authority of the federal courts "to continue the evolutionary development of testimonial privileges 'governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.'" *Trammel*, 445 U.S. at 47 (quoting Fed. R. Evid. 501). As noted above,

This Petition urges the Court to consider an issue that has divided the lower federal courts for decades—whether production of privileged documents to federal law enforcement authorities pursuant to written confidentiality agreements waives privileges with respect to private litigants who otherwise would not be entitled to obtain the privileged materials. Certainly, "reason and experience" counsel that limitations on the waiver effect of cooperation with federal law enforcement authorities will encourage cooperation with law enforcement and should be recognized where consistent with fairness to all litigants, as is the case here.[8]

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this approach was designed to provide the courts flexibility to develop rules of privilege on a case-by-case basis rather than to bind them to a specific set of testimonial privileges.

[8] At the outset, it should be recognized that the issue relates to waiver of privilege, not to the creation of a privilege *vel non*, the views of the Tenth Circuit notwithstanding. (App. 32a-36a) Recognition or creation of a privilege generally renders an entire category of communications inaccessible to all. Since it is commonly recognized that "the public . . . has a right to every man's evidence," *United States v. Nixon*, 418 U.S. 683, 709 (1974), new privileges are recognized only when it is determined that the importance of preserving the confidentiality of those communications "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996); *see also Univ. of Penn. v. EEOC*, 493 U.S. 182, 188-95 (1990) (declining to recognize a privilege that would protect against disclosure of academic peer review materials). Application of limited waiver principles to communications already deemed to be privileged, by contrast, does not have the same impact as the recognition of a new privilege because it does not render entire categories of communications immune from discovery, but rather merely allows a party to maintain the confidence of privileged information against some parties but not others. As a result, the analysis of questions related to the possible waiver of privilege addresses significantly different concerns than does the analysis of questions related to the creation of a privilege itself.

A. Limitation Of Waiver Will Encourage Cooperation With Law Enforcement Without Being Unfair To Private Litigants.

1. *Strong Policy Considerations Favor Limiting The Scope Of Waiver In This Context.*

It can hardly be gainsaid that the efforts of federal law enforcement agencies are enhanced by the cooperation of persons they regulate, since cooperation frequently provides law enforcement agencies with information that otherwise might only be obtained through litigation, if at all. Both the SEC and the DOJ have recognized this truism,[9] and the DOJ

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[9] For example, the DOJ has viewed this type of cooperation as so useful that it has instructed federal prosecutors to consider "waiver of corporate attorney-client and work product protections" as a factor in deciding whether to charge a company with a crime. Memorandum from Deputy Attorney General Larry D. Thompson to U.S. Attorneys (Jan. 20, 2003) (on file with author), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf (last modified Sept. 6, 2006) ("Thompson Memorandum"). While the Thompson Memorandum has come under attack from some circles, it represents DOJ's recognition of the importance of the cooperation of private parties to the effectiveness of law enforcement efforts.

Similarly, in publishing for comment regulations that would have enacted a limited waiver principle, the SEC noted that recognition of a limited waiver principle would "serve[] the public interest because it significantly enhances the Commission's ability to conduct expeditious investigations and obtain prompt relief, where appropriate, for defrauded investors." *Implementation of Standards of Professional Conduct for Attorneys,* SEC Rel. No. 33-8150 (Nov. 21, 2002); 67 Fed. Reg. 71670, 71694 (Dec. 2, 2002). Although the SEC later withdrew this proposal because of questions regarding its jurisdiction to promulgate such a standard by regulation and concerns that the SEC might be infringing on judicial prerogatives if it attempted to do so, the Commission never retreated from its basic position that a limited waiver rule was to be encouraged. *See Implementation of Standards of Professional Conduct for Attorneys,* SEC Rel. No. 33-8185 (Jan. 29, 2003); 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003).

acknowledged in this very case that agreements of the kind at issue allow the government to obtain information promptly, without complicated enforcement proceedings. (App. 74a-75a, n.1) Indeed, the DOJ acknowledged here that the information Qwest produced as a result of the agreements "has been useful for, and in some cases essential to, the United States Attorney's Office's criminal investigation." (App. 77a, ¶ F) It likewise cannot seriously be disputed that corporate and individual cooperation with law enforcement authorities would be enhanced by the recognition of a uniform limited waiver principle that allows parties to cooperate with law enforcement authorities without automatically being compelled to waive their attorney-client privileges and work product protections as to others.

2. *Limiting Privilege Waiver From Production To Law Enforcement Authorities Is Fair To Third Parties.*

Ultimately, the question presented is whether some compromise of the confidentiality of information with respect to law enforcement authorities should in all cases eliminate privileges and work product protections with respect to all others. This issue must be resolved with regard to considerations of fairness, which commonly have played a central role in determining whether waivers have occurred and in defining their scope. *See, e.g., In re Keeper of Records,* 348 F.3d at 23-25; *In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000); *In re von Bulow*, 828 F.2d 94, 101-02 (2d Cir. 1987). For example, fairness considerations are at the heart of the "sword and shield" principles, which prevent a party from advancing certain privileged information in litigation while seeking to deny the adversary access to other privileged information addressing the same subject. *See, e.g., In re Keeper of Records,* 348 F.3d at 25 ("Where a party has not thrust a partial disclosure into ongoing litigation, fairness concerns neither require nor permit massive breaching of the

attorney-client privilege."); *In re Grand Jury Proceedings*, 219 F.3d at 186-87 (reversing district court's blanket finding of waiver because the corporation asserting privilege did not take any affirmative steps to inject privileged materials into the proceeding); *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 704 (10th Cir. 1998) ("Frontier did not use the work product as a sword and is not, therefore, prohibited from shielding the material from discovery."). Considerations of fairness also predominate in the analysis of many courts that are called upon to assess whether inadvertent document disclosure results in a waiver of privilege as to all possible parties, and in determining the scope of any waiver as to those parties for whom waiver is found. *See In re Grand Jury Proceedings*, 219 F.3d at 183 ("When waiver occurs as a result of inadvertent document disclosure, courts have limited the scope of that waiver based on the circumstances involved and overall fairness.") (citing *United States v. Gangi*, 1 F. Supp. 2d 256, 264 (S.D.N.Y. 1998)).

Fairness hardly requires that civil litigants automatically become entitled to prove their cases from the files of opposing counsel or from the privileged communications of their adversaries, merely because an adversary has elected to cooperate with law enforcement authorities. Moreover, as this Court observed in rejecting an argument that a broad definition of the corporate attorney-client privilege might restrict the flow of information, recognition of a limited waiver principle in this context would "put[] the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts . . . ." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

The SEC voiced virtually the identical view in explaining its continuing support for a limited waiver principle in 2003, notwithstanding its decision to withdraw a proposed

regulation accomplishing such a limitation due to concerns about its jurisdiction to address the issue and related concerns about infringing the prerogatives of the federal judiciary. *See* note 9, *supra*. As the SEC explained:

> The Commission also finds that preserving the privilege or protection for internal reports shared with the Commission does not harm private litigants or put them at any kind of strategic disadvantage. At worst, private litigants would be in exactly the same position that they would have been in if the Commission had not obtained the privileged or protected materials.

Implementation of Standards of Professional Conduct for Attorneys, SEC Rel. No. 33-8185; *see also* 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003). Courts have voiced this opinion as well. *See, e.g., Westinghouse,* 951 F.2d at 1426, n.13 ("[I]n our view, when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred."); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) ("The only prejudice that appears to arise is the prejudice that results whenever a party is deprived of information it would rather have. Such prejudice is neither caused nor acerbated by the disclosure of privileged information to the SEC in a separate, nonpublic proceeding to which the plaintiffs were not a party."); *Saito v. McKesson HBOC, Inc.*, Civ. A. No. 18553, 2002 WL 31657622, at *6 (Del. Ch. Nov. 13, 2002) ("[F]airness has little relevance in the context of *selective* waivers . . . because disclosure to one adversary does not prejudice a subsequent adversary any more than it would have if the initial disclosure had never been made.") (emphasis in original).

Finally, any concerns about fairness to litigants are best addressed in the context of the litigation in which those concerns arise, and the courts have ample resources to do so.

For example, if a party sought to use privileged documents that had been produced to law enforcement agencies to its advantage in separate civil litigation, the "sword and shield" principles discussed previously would guide the decision.

In short, there is no reason to adhere to a rigid dogma, holding that disclosure of privileged information to the government waives privileges and work product protections to the universe at large when doing so necessarily diminishes parties' willingness to cooperate with federal law enforcement authorities and is not necessary to promote fairness between the cooperating party and litigants in other venues. Recognition of a limited waiver principle in this context would foster a recognized and important policy interest, leaving to the courts the task of addressing claims of unfairness in the specific factual contexts in which they may later arise.[10]

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[10] As Judge Boggs noted in his dissent in *In re Columbia/HCA Healthcare*,

> It is not clear why an exception to the *third-party waiver rule* need be moored to the justifications of the *attorney-client privilege*. More precisely, we ought to seek guidance from the justifications for the waiver rule to which the exception is made. Those justifications are not exactly coincident with the justifications for the privilege itself. . . .
>
> . . . .
>
> The preference against selective use of privileged material is nothing more than a policy preference, and really also has very little to do with fostering frank communication between attorney and client. The question for this court is one of policy: Whether the benefits obtained by the absolute prohibition on strategic disclosure outweigh the benefits of the information of which the government has been deprived by the rule? As the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail.

293 F.3d at 308, 311 (Boggs, J., dissenting).

B. The Tenth Circuit's Resolution Of This Issue Reflects An Unduly Narrow View Of Judicial Powers And Responsibilities Under Rule 501.

The Tenth Circuit's analysis of the issue was cabined by its unduly narrow view of its powers and responsibilities under Rule 501. As this Court has explained, Rule 501 was enacted to promote flexibility and to allow for growth and change in the development of evidentiary privileges. *Trammel*, 445 U.S. at 46. Necessarily, the "reason and experience" that courts are to apply in determining whether an existing principle is to be adopted or modified should not be constrained by the limits of the record immediately before it. The Court of Appeals failed to recognize that basic proposition.

For example, although the Tenth Circuit acknowledged that recognition of a limited waiver rule "may well be a means to encourage cooperation with law enforcement, an end with unquestioned benefits to the commonwealth" (App. 25a (citing Andrew J. McNally, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 Seton Hall L. Rev. 823, 825-27 (2005))), and characterized the Sixth Circuit's view of the positive contributions of such a rule in even stronger terms,[11] the court ultimately found that "[t]he record before us . . . does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine" (App. 25a). In a similar vein, the Tenth Circuit asserted that "if selective waiver were as essential to government operations as Qwest claims, it would seem the agencies would support Qwest's position." (App. 26a) But, as the court also noted,

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[11] As the Tenth Circuit stated, "[t]he Sixth Circuit majority in *Columbia/HCA Healthcare* conceded that a selective waiver rule would further the search for truth, realize considerable investigative efficiencies, encourage settlements, and possibly increase corporate self-policing." (App. 25a (citing *In re Columbia/HCA Healthcare*, 293 F.3d at 303))

the DOJ "carefully took no position on the parties' dispute" and "declined an invitation to participate in oral argument." (App. 26a)[12]

These observations and others, which appear to have driven the Tenth Circuit's ultimate decision, reflect a begrudging view of the powers and responsibilities of the federal courts that is antithetical to the flexible nature of Rule 501. The question is not whether cooperation with law enforcement authorities will "cease" in the absence of the proposed limited waiver principle, or whether such a rule is "essential to government operations," but whether cooperation with law enforcement authorities would be enhanced if such a rule were recognized. The Tenth Circuit acknowledged that it would. That being the case, the question should then be whether recognition of such a limited waiver principle in cases of this kind can be accomplished without creating unfairness in circumstances such as those here. Qwest respectfully submits that no such unfairness would occur, particularly because, as discussed above, the application of a limited waiver principle would leave private litigants precisely where they would have been if Qwest had never provided the Limited Waiver Material to the government in the first place.

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[12] Rather than speculate about what DOJ *might have said* in support of the position advocated by Qwest, it is more appropriate to focus on what DOJ *did* say. As noted previously, the memorandum filed by the DOJ in this case acknowledged that confidentiality agreements of the kind at issue allow the government to obtain information promptly, without complicated enforcement proceedings (App. 74a-75a, n.1), and that the information Qwest produced as a result of its agreements with the Department of Justice "has been useful for, and in some cases essential to, the United States Attorney's Office's criminal investigation" (App. 77a, ¶ F). The court of appeals made no mention of these DOJ statements at all in its opinion, however. Moreover, the Tenth Circuit answered its own question with respect to the SEC's silence in the mandamus proceeding, noting that the court had not sought the SEC's views. (App. 26a, n.4)

Moreover, recognition of the limited waiver principle advocated here will not place any burdensome obligation on the district courts, as the Tenth Circuit suggested. (App. 28a) Even with a limited waiver principle, the burdens of discovery disputes will continue to remain on the parties in the first instance, requiring them to meet and confer regarding specific issues and disagreements and to present for judicial review those that cannot be resolved without judicial intervention. If particular Limited Waiver Material were actually introduced into evidence in a criminal trial, as the DOJ has indicated may occur, Qwest's privileges would most likely be waived with respect to those particular documents. This more limited waiver, resolved on a document by document basis, is a risk Qwest assumed when it produced these documents to the SEC and the DOJ pursuant to agreements that recognized those agencies' abilities to disclose the documents as required by law or in furtherance of their discharge of their duties and responsibilities. (App. 68a-69a, 70a-72a) The resulting burden on the district court to decide a controversy based on the concrete record presented to it is hardly a basis for refusing to recognize the principle advocated here.[13]

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[13] Nor is it necessary for this Court to identify or address the various scenarios in which a waiver may occur as a result of law enforcement agencies' use of the Limited Waiver Material, or the use of those documents by Qwest itself. In recognizing the psychotherapist-patient privilege in *Jaffee*, this Court indicated that the precise contours of that privilege would be developed thereafter on a case-by-case basis, noting that "[a] rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner." 518 U.S. at 18. The same analysis would be expected in this case as well, even though no new privilege is involved.

III. THIS PETITION PRESENTS AN ISSUE OF CONSIDERABLE PUBLIC IMPORTANCE THAT SHOULD BE RESOLVED AT THIS TIME.

A. This Is An Issue Of Significant Importance To Federal Law Enforcement Agencies And Their Potential Targets Alike.

The attorney-client privilege is an essential foundation of the attorney-client relationship. It promotes a client's candor with his or her counsel, thus enabling the attorney to fully understand the facts relating to an issue on which legal advice is sought. In the corporate context, the privilege allows employees to engage in the "full and frank communications" that are essential to avoid corporate wrongdoing and error, and to discover and address them when they occur. *Upjohn Co.*, 449 U.S. at 389; *see generally id.* at 389-93; *see also Trammel*, 445 U.S. at 50 (the attorney-client privilege promotes "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth"); *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) (observing that "counseling clients and bringing them into compliance with the law" is a "valuable social service [that] cannot be performed effectively if clients are scared to tell their lawyers what they are doing").

The separate protections of the work product doctrine are equally important, as they recognize that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Absent the protections of the work product doctrine, "much of what is now put down in writing would remain unwritten . . . [a]nd the interests of the clients and the cause of justice would be poorly served." *Id.* at 511.

As the Tenth Circuit correctly noted, "the issue of selective waiver is of considerable public interest." (App. 7a) Indeed, it has become an issue of significant importance both to federal law enforcement authorities and to those seeking to cooperate with them.

Federal law enforcement authorities are increasingly demanding that companies they investigate produce privileged documents and have come to depend on such cooperation as a means of conserving scarce resources. When federal authorities make such demands, the responding company is faced with a difficult choice. It can say no and be deemed uncooperative—risking suit, regulatory sanction, or a catastrophic indictment—or it can acquiesce and thereby run the risk of possibly waiving its privileges with respect to an unknown and unknowable number of adversaries in separate civil litigation involving other parties. As the Association of Corporate Counsel and the Chamber of Commerce of the United States noted as *amici* before the Tenth Circuit, increasing prosecutorial demands for waivers of privilege as an element of cooperation in their investigations has led to a "culture of waiver." (App. 36a) Thus, those organizations supported the limited waiver principle advocated in the court of appeals as one means of mitigating the possible adverse consequences of cooperation with law enforcement authorities. (App. 36a)

Because of the importance and difficulty of such decisions, it is critical that everyone involved have a clear understanding of the rules governing their cooperation with law enforcement authorities—and that those rules be uniform. As this Court has instructed, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn Co.*, 449 U.S. at 393. The variation and ambiguity among the United States Courts

of Appeals compounds these problems, leaving litigants uncertain about whether conduct constitutes a waiver of privilege and thus chilling potential cooperation with law enforcement efforts.

B. Recent Activities Of The Advisory Committee On Evidence Rules Confirm The Importance Of This Issue And The Merit Of The Principle Advocated By Qwest.

On August 10, 2006, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Standing Committee") published for public comment a proposed Rule 502 of the Federal Rules of Evidence which, if adopted in its current form, would recognize that disclosure of privileged information to federal or state agencies during their investigations does not effect a waiver of privilege as to third parties.[14] The activities of the Advisory Committee are significant in two respects. First, as the Tenth Circuit recognized, concerns voiced by the Advisory Committee and others evidence the significant public interest in the issues

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[14] *See* Memorandum from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules (Aug. 10, 2006) (on file with author), *available at* http://www.uscourts.gov/rules/Memo_Bench_Bar_and_Public_2006.pdf (last modified Sept. 6, 2006). Proposed Rule 502(b)(3) provides as follows:

> A voluntary disclosure [of privileged information] does not operate as a waiver if the disclosure is made to a federal, state or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

Memorandum from Jerry E. Smith, Chair of the Advisory Committee on Evidence Rules, to David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (revised June 30, 2006) (on file with author), *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4 (last modified Sept. 6, 2006).

presented by this Petition. (App. 7a, n.2) Second, although the Advisory Committee process is in its preliminary phases, the proposed Rule it has advanced for public comment evidences at the very least that the principle Qwest advocates in this Petition is a responsible one that is entitled to serious consideration.

The activities of the Advisory Committee should not, however, diminish the Court's willingness to entertain this Petition and address the issue on the merits. That Committee is only in the initial phases of an extended process that will not conclude for years.[15] No one knows at this point whether any new Rules of Evidence will result from this process, much less what they might be. Furthermore, none of these developments will assist this Petitioner, which has properly raised the issue now. More important, perhaps, the issue of limited waiver will remain one of considerable public significance as to which the lower courts will remain profoundly divided unless and until a new rule of evidence is adopted.

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[15] In view of the elaborate rulemaking processes established by Congress and codified in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, as supplemented by official publications of the Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts, *see The Rulemaking Process: A Summary for the Bench and the Bar* (Apr. 2006), *available at* http://www.uscourts.gov/rules/proceduresum.htm (last modified Sept. 6, 2006); *The Rulemaking Process: Judicial Conference Procedures*, *available at* http://www.uscourts.gov/rules/procedurejc.htm (last modified Sept. 6, 2006), the process for consideration and eventual promulgation of a proposed new rule of evidence will almost certainly take more than two years. Even if Proposed Rule 502 proceeds through all of the necessary review and public comment periods at the most expeditious pace contemplated by the rulemaking procedures, it would not be transmitted to this Court for submission to Congress before May 1, 2008. Moreover, because the proposed Rule 502 affects privilege, 28 U.S.C. § 2074(b) requires that it be enacted directly by Congress. Thus, once the formal rule-making process draws to a close, there is no automatic implementation that would establish any limitation on the period for Congressional action, as is the case for some proposed rules.

This Petition presents the issue clearly, and this Court's resolution of the question at this time is both necessary and appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

TERENCE C. GILL
SHERMAN & HOWARD, LLC
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

JONATHAN D. SCHILLER
DAVID R. BOYD
Counsel of Record
ALFRED P. LEVITT
KENNETH F. ROSSMAN, IV
TRICIA J. BLOOMER
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015
(202) 237-2727

September 6, 2006

Attorneys for Petitioner,
Qwest Communications International Inc.

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed June 19, 2006]

No. 06-1070

In re: QWEST COMMUNICATIONS INTERNATIONAL INC.,
Securities Litigation,
Petitioner,

NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND;
CLIFFORD MOSHER; TEJINDAR SINGH; SAT PAL SINGH,
Real-Parties-in-Interest,

and

ASSOCIATION OF CORPORATE COUNSEL; CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA,
Amici Curiae.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 01-CV-1451-REB-CBS)

David R. Boyd, Boies, Schiller & Flexner, LLP, Washington, D.C., (Jonathan D. Schiller, Alfred P. Levitt, Kenneth F. Rossman IV, Boies, Schiller & Flexner, LLP, Washington, D.C.; Terrence C. Gill, Sherman & Howard LLC, Denver, Colorado, with him on the brief), for Petitioner.

Joseph D. Daley, Lerach Coughlin Stoia Geller Rudman & Robbins, LLP, San Diego, California, (Eric Alan Isaacson,

Michael J. Dowd, Spencer A. Burkholz, Thomas E. Egler, X. Jay Alvarez, Lerach Coughlin Stoia Geller Rudman & Robbins, LLP, San Diego, California; Robert J. Dyer, III, Kip B. Shuman, Jeffrey A. Berens, Dyer & Shuman, LLP, Denver, Colorado, with him on the briefs), for Real-Parties-in-Interest.

William J. Leone, United States Attorney, Denver, Colorado; Catherine Y. Hancock, Michael S. Rabb, Appellate Staff, United States Department of Justice, Washington, D.C., on the brief for the United States Department of Justice.

Susan Hackett, Association of Corporate Counsel; Robin S. Conrad, Amar D. Sarwal, National Chamber Litigation Center, Inc.; W. Stephen Cannon, Todd Anderson, Jean Kim, Constantine Cannon, P.C., Washington, D.C., on the brief for Amici Curiae.

Before **HENRY, MURPHY**, and **HARTZ**, Circuit Judges.

MURPHY, Circuit Judge.

In this mandamus action, Qwest Communications International, Inc. (Qwest), presents an issue of first impression in this circuit, namely, whether Qwest waived the attorney-client privilege and work-product doctrine, as to third-party civil litigants, by releasing privileged materials to federal agencies in the course of the agencies' investigation of Qwest. Qwest urges us to adopt a rule of "selective waiver" or "limited waiver" which would allow production of attorney-client privileged and work-product documents to the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) without waiver of further protection for those materials. On the record before us, we hold that the district court did not abuse its discretion in

declining to apply selective waiver. Thus, we DENY the petition for a writ of mandamus.

I. Background and District Court Proceedings

In early 2002, the SEC began investigating Qwest's business practices. In the summer of 2002, Qwest learned that the DOJ, through the United States Attorney's Office for the District of Colorado, had also commenced a criminal investigation of Qwest. During these investigations, Qwest produced to the agencies over 220,000 pages of documents protected by the attorney-client privilege and the work-product doctrine (the Waiver Documents). Qwest chose not to produce another 390,000 pages of privileged documents to the agencies.

The production of the Waiver Documents was pursuant to subpoena and pursuant to written confidentiality agreements between Qwest and each agency.[1] In relevant part, these agreements stated that Qwest did not intend to waive the attorney-client privilege or work-product protection. The SEC agreed to "maintain the confidentiality of the [Waiver Documents] pursuant to this Agreement and . . . not disclose them to any third party, except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities." Pet'r Br., Ex. B at 1. Similarly, the DOJ agreed to maintain the Waiver Documents' confidentiality and not disclose them to third parties, "except to the extent that DOJ determines that disclosure is otherwise required by law or would be in furtherance of DOJ's dis-

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[1] At oral argument Qwest disclaimed any argument that its production of the Waiver Documents to the agencies was involuntary. Thus, we take it as settled that Qwest's production of the Waiver Documents was voluntary, and we do not address the effect of the subpoenas. We commend Qwest for its candor, which allows us to focus on material issues rather than extraneous matters.

charge of its duties and responsibilities." *Id.*, Ex. C at 1. In addition, Qwest agreed that the DOJ could share the Waiver Documents with other state, local, and federal agencies, and that it could "make direct or derivative use of the [Waiver Documents] in any proceeding and its investigation." *Id.* at 1-2. In other agreements with the DOJ, Qwest agreed that the agency could

> make full use of any information it obtains under this agreement in any lawful manner in furtherance of its investigation, including, without limitation, analyses, interviews, grand jury proceedings, court proceedings, consultation with and support of other federal, state or local agencies, consultations with experts or potential experts, and the selection and/or retention of testifying experts.

DOJ Resp. Br., Ex. 3 at 1; *see also id.* Ex. 4 at 3 (same); *id.* Ex. 5 (same) at 1-2.

Even prior to the initiation of the federal investigations, plaintiffs had filed civil cases against Qwest that involved many of the same issues as the investigations. More such actions were filed after the federal investigations began. Several of the cases were filed in the United States District Court for the District of Colorado, and many were consolidated into a federal securities action designated *In re Qwest Communications International, Inc. Securities Litigation*, Case No. 1:01-CV-01451 REB-CBS (the Securities Case). The Real Parties in Interest before us (the Plaintiffs) are the lead plaintiffs in the Securities Case.

In the course of the Securities Case, Qwest produced millions of pages of documents to the Plaintiffs, but it did not produce the Waiver Documents. It argued the Waiver Documents remained privileged despite Qwest's production to the agencies. After the Plaintiffs moved to compel production of the Waiver Documents, the magistrate judge concluded Qwest

had waived the attorney-client privilege and work-product protection by producing the Waiver Documents to the agencies and ordered Qwest to produce the Waiver Documents to the Plaintiffs. Qwest objected. The district court refused to overrule the magistrate judge's order compelling production and ordered Qwest to produce the Waiver Documents. The district court also ordered Qwest to produce certain reports prepared by its counsel Boies, Schiller & Flexner LLP (collectively, the BSF Report), redacted of attorney opinion work product.

Qwest filed a motion to reconsider the order to produce the Waiver Documents and to certify an interlocutory appeal. Granting the motion in part, the district court clarified its order to specify that Qwest could redact attorney opinion work product from the Waiver Documents, as well as from the BSF Report, before producing them to the Plaintiffs. The court, however, declined to certify an interlocutory appeal of the waiver issue. Consequently, Qwest filed a petition for a writ of mandamus in this court. At Qwest's request, the district court stayed its order to produce pending our mandamus decision.

Neither the directive to redact the BSF Report nor the order to disclose the redacted version have been challenged in this proceeding. Moreover, the parties have not challenged the order to redact attorney opinion work product from the Waiver Documents. Thus, there is no issue concerning opinion work product before us, and our decision is not directed to waiver of opinion work product. For purposes of clarity, we also note that this decision involves no issues of inadvertent disclosure, *see, e.g., Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997), disclosure to a non-adverse party, *see In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993), or disclosure under a confidentiality agreement that prohibits further disclosures without the express agreement of the privilege holder.

II. Analysis

A. Mandamus

We must first decide whether it is appropriate for us to entertain Qwest's petition for an extraordinary writ. "The Supreme Court has required that a party seeking mandamus demonstrate that he has no other adequate means of relief and that his right to the writ is 'clear and indisputable.'" *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir. 1984) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam)).

> In a mandamus action in which petitioner seeks to have discovery orders involving a claim of privilege reviewed, we have held that review is appropriate when: (1) disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and (2) the disclosure involves questions of substantial importance to the administration of justice.

Id. at 654-55 (quotations omitted).

Citing *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993), the Plaintiffs first contend Qwest has adequate appellate remedies, in that the district court's order can be reviewed on direct appeal after final judgment. In *Boughton*, a company sought to bring an interlocutory appeal of an order to produce allegedly privileged documents. In considering whether other avenues of relief might be appropriate, this court held that it could not grant the defendant mandamus relief because the district court's order requiring production would be correctable on appeal. *Id.* at 751. Qwest replies that production would negate the value of the attorney-client privilege and work-product protection. Qwest further submits that appellate review after judgment would be meaningless because there are numerous other cases pending across the country in which coordinated discovery agreements would

require it to disclose the Waiver Documents to other plaintiffs if it discloses them to the Plaintiffs in the Securities Case.

In *Barclaysamerican*, this court held that "[i]n most cases disclosure makes meaningful review impossible because after disclosure whatever privilege attaches would be worthless." 746 F.2d at 655 (quotation omitted); *see also United States v. West*, 672 F.2d 796, 799 (10th Cir. 1982) ("Whether disclosure is limited to a motion or granted in the course of the trial, the privilege is still rendered worthless. Any subsequent review, even after limited disclosure, would be for naught, because the damage would already be accomplished. Thus, appellate review of the claim would be meaningless."). *Boughton* did not address this principle. In this case, however, given the litigation pending outside this court's jurisdiction, normal appellate review could not return the parties to the status quo by ordering the return of any documents this court might determine were improperly ordered produced. As in *Barclaysamerican* and *West*, review after production would essentially be meaningless in terms of protecting the Waiver Documents.

The Plaintiffs also argue Qwest does not raise an issue of substantial importance to the administration of justice, and this case is instead merely a discovery dispute between private litigants. *See Barclaysamerican*, 746 F.2d at 655. To the contrary, it appears the issue of selective waiver is of considerable public interest.[2] In addition, in advocating the adoption of selective waiver, Qwest primarily relies on the

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[2] Indicia of public interest in selective waiver include numerous commentaries and articles, the filing of the amicus brief in this action, a recent oversight hearing by a House subcommittee, and recent developments before the United States Sentencing Commission and the Advisory Committee on Evidence Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Advisory Committee). The actions of Congress, the Sentencing Commission, and the Advisory Committee are discussed below.

interests of law enforcement in ensuring voluntary cooperation of companies subject to investigation. To the extent this matter requires us to consider applying selective waiver, then, it presents an issue of substantial importance to the administration of justice.

Finally, other circuit courts considering selective waiver have decided it was appropriate to do so in the context of a petition for a writ of mandamus. *See In re Steinhardt Partners, L.P.*, 9 F.3d 230, 233 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1422 (3d Cir. 1991); *In re Chrysler Motors Corp.*, 860 F.2d 844, 845 (8th Cir. 1988); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 607 (8th Cir. 1977) (en banc). Noting that the question remained open in the circuit, that the district courts of the circuit and other circuit courts had split, and the consequence that the privilege would be lost if review awaited final judgment, the Second Circuit went so far as to state, "[t]his dispute presents one of the very rare circumstances permitting the use of mandamus to review a district court order." *Steinhardt Partners*, 9 F.3d at 233. For these reasons, this court addresses the merits of Qwest's petition.

The issuance of the writ rests within the court's discretion. *Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976). This court considers five nonconclusive factors to assist in determining whether to grant mandamus relief: (1) whether the party has alternative means to secure relief; (2) whether the party will be damaged "in a way not correctable on appeal"; (3) whether "the district court's order constitutes an abuse of discretion"; (4) whether the order "represents an often repeated error and manifests a persistent disregard of federal rules"; and (5) whether the order raises "new and important problems or issues of law of the first impression." *Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151, 153 (10th Cir. 1995). We have held that "[t]he right to the writ is clear and indisputable when the petitioner can show a judicial

usurpation of power or a clear abuse of discretion." *West*, 672 F.2d at 799; *see also Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998) (holding that a district court's order compelling discovery is reviewed for abuse of discretion, legal questions are reviewed de novo and factual determinations for clear error). When the district court errs in deciding a legal issue, it necessarily abuses its discretion. *See Koon v. United States*, 518 U.S. 81, 100 (1996).

B. The Attorney-Client Privilege and Work-Product Doctrine

Federal Rule of Evidence 501 provides that privileges in federal-question cases generally are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Advisory Committee Notes state that the rule "reflect[s] the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."[3]

The Supreme Court has cautioned that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quotations omitted). The Court further has cautioned that

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[3] Technically the work-product doctrine is distinguishable from the testimonial "true" privileges. *See* 1 Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 1.3.11 (Richard D. Friedman ed., 2002). The work-product doctrine is embodied in Fed. R. Civ. P. 26(b)(3). It is therefore excepted from Rule 501, which applies except where "otherwise required . . . in rules prescribed by the Supreme Court pursuant to statutory authority." The principles of *Hickman v. Taylor*, 329 U.S. 495 (1947), continue to govern the application of Rule 26(b)(3). Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 479-81 (4th ed. 2001). Given that our analysis focuses on the common law, the fact that the work-product doctrine is not a true privilege is not material in this case.

such rules and privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). "[A]lthough Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (citation and quotation omitted).

1. Attorney-Client Privilege

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The privilege serves the client's need for legal advice, but it also serves the attorney's need to receive complete information in order to give the proper advice. *See id.* at 390; *see also* 8 John Henry Wigmore, *Evidence* § 2291 (John T. McNaughton rev. 1961); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 3 (4th ed. 2001). Under the common law, a critical component of the privilege "is whether the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence." *United States v. Lopez*, 777 F.2d 543, 552 (10th Cir. 1985).

Because confidentiality is key to the privilege, "[t]he attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party."

United States v. Ryans, 903 F.2d 731, 741 n.13 (10th Cir. 1990). This court has stated, "the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *Id.* (quotation and alteration omitted). This court has also held that "[c]ourts need not allow the claim of attorney-client privilege when the party claiming the privilege is attempting to utilize the privilege in a manner that is not consistent with the privilege." *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989). "Any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege." *Id.*

2. Work-Product Doctrine

In *Hickman v. Taylor*, the source of the work-product doctrine, plaintiffs sought the production of certain witness statements collected by defendants' attorney and memoranda concerning the attorney's interviews of other witnesses. 329 U.S. 495, 499-500 (1947). The Court held that plaintiffs had made no showing of need for the materials or justification for securing them from defendants' counsel. The requests thus "[fell] outside the arena of discovery and contravene[d] the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Id.* at 510. "In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.*

The work-product doctrine subsequently was incorporated into Fed. R. Civ. P. 26(b)(3), which provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision

> (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another . . . party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Thus, the doctrine is interpreted under both the rule and *Hickman*. *See* Epstein at 479-81. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). It "is an intensely practical [doctrine], grounded in the realities of the litigation in our adversary system." *Id.*

Work product can be opinion work product, which some courts have held to be absolutely privileged, or non-opinion work product, i.e., fact work product, which may be discoverable under appropriate circumstances. *See Frontier Ref.*, 136 F.3d at 704 n.12; *see also Hickman*, 329 U.S. at 511-12 (noting that, upon presentation of adequate reasons, non-privileged, relevant facts included in an attorney's files may be subject to discovery); Fed. R. Civ. P. 26(b)(3) (providing special protection for opinion work product). The protection provided by the work-product doctrine is not absolute, and it may be waived. *See Nobles*, 422 U.S. at 239. This court has indicated that production of work-product material during discovery waives a work-product objection. *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775, 801-02 (10th Cir. 2005); *see also Foster v. Hill (In re Foster)*, 188

F.3d 1259, 1272 (10th Cir. 1999) (indicating that the work-product doctrine is affected when a disclosure is to an adversary).

C. Case Law on Selective Waiver

In light of this precedent, Qwest will have waived the attorney-client privilege and work-product protection for the Waiver Documents by disclosing them to the SEC and the DOJ, unless this court adopts a selective waiver rule. This court has not yet considered the concept of selective waiver. Our review of the opinions of other circuits, however, indicates there is almost unanimous rejection of selective waiver. Only the Eighth Circuit has adopted selective waiver in circumstances applicable to Qwest.

1. Attorney-Client Privilege

a. Circuit Adopting Selective Waiver

The Eighth Circuit created the concept of selective waiver in *Diversified Industries*, 572 F.2d at 611. There, a company defending a civil proceeding sought to protect a memorandum and a report prepared by its counsel that it had previously produced to the SEC in response to an agency subpoena. *Id.* at 599. The court's discussion of selective waiver is but a single paragraph:

> We finally address the issue of whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena. As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

Id. at 611 (citations omitted).

b. Circuits Rejecting Selective Waiver

Most circuits have rejected selective waiver of the attorney-client privilege. The D.C. Circuit was the first circuit to consider the issue after *Diversified.* In *Permian Corp. v. United States,* the Department of Energy requested documents from the SEC, which had obtained them from the company. 665 F.2d 1214, 1216-17 (D.C. Cir. 1981). After considering the privilege's purpose of protecting the attorney-client relationship by shielding confidential communications, the court held that the company had "destroyed the confidential status of the seven attorney-client communications by permitting their disclosure to the SEC staff." *Id.* at 1219. It found the proposal of selective waiver "wholly unpersuasive." *Id.* at 1220.

> First, we cannot see how the availability of a "limited waiver" would serve the interests underlying the common law privilege for confidential communications between attorney and client. . . . Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency.

Id. at 1220-21. The court continued, "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Id.* at 1221. "We believe that the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality." *Id.* at 1222. The

D.C. Circuit reiterated its position in *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984).

Using similar reasoning, the First, Second, Third, and Fourth Circuits all have joined the D.C. Circuit in rejecting selective waiver. *See United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) ("Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path—which has no logical terminus—and we join in this reluctance."); *Westinghouse*, 951 F.2d at 1425 ("[S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose."); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988) ("The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege."); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) ("A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes.").

The most recent circuit to reject selective waiver of the attorney-client privilege is the Sixth Circuit, which issued a comprehensive opinion in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). As in this case, civil plaintiffs in *Columbia/HCA Healthcare* sought documents the company already had pro-

vided to the DOJ and other government agencies. *Id.* at 292-93. The court reviewed the available case law, which it characterized as falling into three categories: "selective waiver is permissible; selective waiver is not permissible in any situation; and selective waiver is permissible in situations where the Government agrees to a confidentiality order." *Id.* at 295 (citations omitted). It concluded, "after due consideration, we reject the concept of selective waiver, in any of its various forms." *Id.* at 302. "First, the uninhibited approach adopted out of wholecloth by the *Diversified* court has little, if any, relation to fostering frank communication between a client and his or her attorney." *Id.* (footnote omitted). "Secondly, any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.'" *Id.* (quoting *Steinhardt Partners*, 9 F.3d at 235). Although recognizing "[t]here is considerable appeal, and justification, for permitting selective waiver when the initial disclosure is to an investigating arm of the Government," the court stated there is "no logical terminus" and that private litigants serve a valuable purpose as private attorneys general which should not be thwarted by imposition of selective waiver. *Id.* at 303 (quotation omitted).

In dissent, Judge Boggs stated that "[a]s the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail." *Id.* at 311. He characterized the court's choice as:

> [N]ot one whether or not to release privileged information to private parties that has already been disclosed to the government, but rather one to create incentives that permit voluntary disclosures to the government at all. In the run of cases, either the government gets the disclosure made palatable because of the exception, or

> neither the government nor any private party becomes privy to the privileged material.

Id. at 312 (Boggs, J., dissenting). Because of the greater importance of governmental investigations, the fact that "increased access to privileged information increases the absolute efficacy of government investigations," and the fact that "the government has no other means to secure otherwise privileged information," *id.* at 311, Judge Boggs "would have resolved this open question by holding that there is a government investigation exception to the third-party waiver rule," *id.* at 308.

c. Other Illustrative Cases

In a case involving an asserted waiver of the law enforcement privilege, the Seventh Circuit did not foreclose adopting selective waiver. In *Dellwood Farms, Inc. v. Cargill, Inc.*, the government played certain tapes for corporate defense counsel to persuade the company to plead guilty. 128 F.3d 1122, 1124 (7th Cir. 1997). The plaintiffs in ensuing civil litigation against the company argued the government had waived its law enforcement privilege by playing the tapes. *Id.* Any release to the plaintiffs would make the tapes available to individuals who were the targets of then-uncompleted grand jury investigations. *Id.* The court adopted the government's selective waiver theory in the circumstances of that case, holding that "[s]ince there is no indication either that the government was acting in bad faith or that the plaintiffs in the present suits were hurt—and, to repeat, the government is not trying to take advantage of an adversary—interfering with a criminal investigation would be an excessive punishment." *Id.* at 1127. The court specifically noted, though, that it might find waiver (or, more accurately, forfeiture) if there were "conduct that warranted declaring a forfeiture." *Id.*

The Federal Circuit rejected selective waiver in a case involving an entirely different means of waiving attorney-

client and work-product protection, namely, the careless disclosure of inadequately screened materials directly to the adversary. *See Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) ("A small number of courts have recognized, in circumstances not present here, a limited waiver that enables the attorney-client privilege to survive certain breaches of confidentiality. This court, however, has never recognized such a limited waiver. Moreover, Genentech has presented no compelling arguments as to why we should apply such a limited waiver theory in this case." (citations omitted)).

In contrast is *In re M & L Business Machine Co.*, where the district court applied selective waiver of the attorney-client privilege where disclosures were protected by a confidentiality agreement. 161 B.R. 689 (D. Colo. 1993). There, a bank sought a protective order for its counsel's letters and memoranda that it had previously provided to the United States Attorney to assist in an investigation of one of the bank's clients, M & L Business Machines Co. *Id.* at 691-92. "The Bank's cooperation was expressly made subject to the requirement that any information provided under the Letter Agreement be treated as privileged, subject to protection under Fed. R. Crim. P. 16(a)(2) and not be disseminated except as required under federal law or the rules of criminal procedure." *Id.* at 691. The trustee of M & L then sought production of the materials. After reviewing *Diversified, Permian*, and other selective waiver cases, the district court stated, "while I am wary of extending evidentiary privileges, in the unique circumstances of this case, the policies upon which the above decisions were based lead me to conclude that the Bank has not waived the attorney-client privilege as to the Letters and Memoranda." *Id.* at 696. Specifically, the court's decision rested on: (1) the "substantial steps" the bank took to ensure the confidentiality of the materials disclosed; (2) the fact that there was "no evidence that the Bank's cooperation with the U.S. Attorney was for the purpose of

obtaining some benefit for itself"; and (3) the fact that "the Bank does not seek to protect the privilege in an investigatory or law enforcement proceeding brought by another federal regulatory agency," but in bankruptcy adversary proceedings "akin to one brought by a civil litigant." *Id.*

2. Work-Product Doctrine

a. Circuits Adopting Selective Waiver

Only one circuit has specifically adopted selective waiver in the work-product arena. The Fourth Circuit has approved using selective waiver in relation to opinion work product. In *Martin Marietta*, the court concluded the company had made testimonial use of non-opinion work product by disclosing it to the government, and that the waiver was comprehensive. 856 F.2d at 625. Noting that opinion work product generally receives greater protection from the courts, however, and that Federal Rule of Civil Procedure 26(b)(3) "suggests especial protection for opinion work product," the court declined to hold that the company had waived work-product protection for opinion work product. *Id.* at 626.

In *Permian*, the D.C. Circuit upheld the district court's finding that the work-product doctrine had not been waived as to the majority of documents. 665 F.2d at 1222. This ruling, however, contains no analysis and may have been the product of the clearly erroneous standard of review applied in that case. Moreover, the D.C. Circuit has since rejected selective waiver of work-product protection in other circumstances, as discussed below.

b. Circuits Rejecting Selective Waiver

Interestingly, the circuit that created selective waiver for attorney-client privilege rejected it in the context of non-opinion work product. In *Chrysler Motors*, the company had produced a computer tape to its adversaries in civil litigation under a non-waiver/confidentiality agreement. 860 F.2d at

845. When the United States Attorney sought production of the computer tape from the plaintiffs, the company protested. *Id.* The Eighth Circuit determined that the tape was not opinion work product. *Id.* at 846. It then held that "Chrysler waived any work product protection by voluntarily disclosing the computer tape to its adversaries, the class action plaintiffs, during the due diligence phase of the settlement negotiations." *Id.* The company's requirement that the plaintiffs enter into the non-waiver/confidentiality agreement was irrelevant; the crucial fact was that the computer tape had not been kept confidential. *Id.* at 847.

As discussed above, the Fourth Circuit applied selective waiver to protect opinion work product, but it declined to apply it to protect non-opinion work product. *See Martin Marietta Corp.*, 856 F.2d at 623. The First Circuit has also rejected selective waiver for non-opinion work product, stating "it would take better reason than we have to depart from the prevailing rule that disclosure to an adversary, real or potential, forfeits work product protection." *Mass. Inst. of Tech.*, 129 F.3d at 687.

The Third Circuit held that, while work-product protection may be retained where a disclosure furthers the goals underlying the doctrine:

> When a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine. Moreover, an exception for disclosures to government agencies is not necessary to further the doctrine's purposes; attorneys are still free to prepare their cases without fear of disclosure to an

> adversary as long as they and their clients refrain from making such disclosures themselves.

Westinghouse, 951 F.2d at 1429.

Finally, the Sixth Circuit concluded that "[m]any of the reasons for disallowing selective waiver in the attorney-client privilege context also apply to the work product doctrine. The ability to prepare one's case in confidence . . . has little to do with talking to the Government." *Columbia/HCA Healthcare*, 293 F.3d at 306. It continued, "[e]ven more than attorney-client privilege waiver, waiver of the protections afforded by the work product doctrine is a tactical litigation decision. . . . [W]hether or not to 'show your hand' is quintessential litigation strategy." *Id.* at 306-07.

c. Circuits Leaving Possibility of Selective Waiver Open

Unlike their treatment of the attorney-client privilege, a few circuits have rejected selective waiver of work-product protection in the particular cases before them, while simultaneously leaving room for applying the doctrine in other circumstances.

In *In Re Sealed Case*, the D.C. Circuit rejected work-product protection against discovery by a grand jury of documents a company had previously made available to the SEC. 676 F.2d 793, 824 (D.C. Cir. 1982). The record in that case did not indicate whether the company had entered into a confidentiality agreement with the SEC. *Id.* at 820. In rejecting selective waiver, the court indicated it was reluctant to supply any such agreement: "[t]he SEC or any other government agency could expressly agree to any limits on disclosure to other agencies consistent with their responsibilities under law. But courts should not imply such agreements on a categorical basis." *Id.* at 824.

Shortly thereafter, in *In re Subpoenas Duces Tecum*, the D.C. Circuit applied *Sealed Case* to reject a claim of selective

waiver for work-product material in circumstances similar to Qwest's case. 738 F.2d at 1371-72. The court, however, did not definitively reject the selective waiver doctrine under all circumstances; rather, the decision rested on three factors: (1) the proposed use of work-product protection was not consistent with the doctrine's purpose, (2) "appellants had no reasonable basis for believing that the disclosed materials would be kept confidential by the SEC," and (3) applying waiver "would not trench on any policy elements now inherent in this [protection]." *Id.* at 1372. Noting the company chose to participate in the SEC's voluntary disclosure program, the court stated:

> That decision was obviously motivated by self-interest. Appellants now want work product protection for those same disclosures against different adversaries in suits centering on the very same matters disclosed to the SEC. It would be unreasonable to suppose that litigation with these other adversaries was not anticipated at the time of disclosure to the SEC. It would also be inconsistent and unfair to allow appellants to select according to their own self-interest to which adversaries they will allow access to the materials.

Id. The court emphasized that the company had failed to ensure the SEC would in turn not disclose the materials, stating that companies could protect their materials by not disclosing them, "[o]r the company can insist on a promise of confidentiality before disclosure to the SEC." *Id.* at 1375.

Similarly, in *Steinhardt Partners*, the Second Circuit denied mandamus relief to defendants claiming work-product protection for a memorandum previously disclosed to the SEC. 9 F.3d at 230. "Examination of conflicting authority and of the purposes of the work product doctrine convinces us that Steinhardt waived any work product protection by voluntarily submitting the memorandum to the SEC." *Id.* at 235. The court, however, continued, "[i]n denying the petition, we

decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis." *Id.* at 236. It especially noted that a per se rule "would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials." *Id.*

These decisions all involved situations in which the parties failed to enter into a confidentiality agreement before disclosing materials, not circumstances in which the government agreed to strict confidentiality in exchange for disclosure of work product. *But see Columbia/HCA Healthcare*, 293 F.3d at 307 (rejecting selective waiver for work product, despite existence of confidentiality agreement); *Westinghouse*, 951 F.2d at 1430 (same). As a consequence, it remains an open question in those circuits whether a stringent confidentiality agreement limiting further dissemination by the government might support selective waiver.

D. No Selective Waiver In This Case

Generally it is the nature of the common law to move slowly and by accretion; swift and massive movements are not impossible, but they are relatively rare. Justice Cardozo described the common law's modification process as "gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier." Benjamin N. Cardozo, *The Nature of the Judicial Process 24* (1921). The common law's methodology has been identified as both its strength and its weakness:

> [I]ts strength is derived from the manner in which it has been forged from actual experience by the hammer and anvil of litigation, and . . . its weakness lies in the fact that law guided by precedent which has grown out of

> one type of experience can only slowly and with difficulty be adapted to new types which the changing scene may bring.

Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 7 (1936); *see also* Richard B. Cappalli, *The American Common Law Method* 15 (1997) (stating that "[t]he accretional nature of the common law is a great strength").

Keeping these precepts in mind, and having considered the purposes behind the attorney-client privilege and the work-product doctrine as well as the reasoned opinions of the other circuits, we conclude the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material. Qwest advocates a rule that would preserve the protection of materials disclosed to federal agencies under agreements which purport to maintain the attorney-client privilege and work-product protection but do little to limit further disclosure by the government. The record does not establish a need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege or work-product doctrine, or to avoid unfairness to the disclosing party. Rather than a mere exception to the general rules of waiver, one could argue that Qwest seeks the substantial equivalent of an entirely new privilege, i.e., a government-investigation privilege. Regardless of characterization, however, the rule Qwest advocates would be a leap, not a natural, incremental next step in the common law development of privileges and protections. On this record, "[w]e are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination." *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

1. Cooperation with Law Enforcement

Qwest argues selective waiver is necessary to ensure cooperation with government investigations. Selective waiver

may well be a means to encourage cooperation with law enforcement, an end with unquestioned benefits to the commonweal [*sic*]. *See, e.g.*, Andrew J. McNally, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 Seton Hall L. Rev. 823, 825-27 (2005). The Sixth Circuit majority in *Columbia/HCA Healthcare* conceded that a selective waiver rule would further the search for truth, realize considerable investigative efficiencies, encourage settlements, and possibly increase corporate self-policing. 293 F.3d at 303.

The record before us, however, does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine. Most telling is Qwest's disclosure of 220,000 pages of protected materials knowing the Securities Case was pending, in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances, and despite the absence of Tenth Circuit precedent. These actions undermine its argument that selective waiver is vitally necessary to ensure companies' cooperation in government investigations. *See Steinhardt Partners*, 9 F.3d at 236 ("The SEC has continued to receive voluntary cooperation from subjects of investigations, notwithstanding the rejection of the selective waiver doctrine by two circuits and public statements from Directors of the Enforcement Division that the SEC considers voluntary disclosures to be discoverable and admissible."); *Westinghouse*, 951 F.2d at 1426 ("[W]e do not think that a new privilege is necessary to encourage voluntary cooperation with government investigations. . . . We find it significant that Westinghouse chose to cooperate despite the absence of an established privilege[] protecting disclosures to government agencies."); *see also Branzburg*, 408 U.S. at 693-94 (rejecting creation of reporters' privilege and stating "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court

reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen"). The record is equally deficient concerning whether the DOJ and the SEC may have independently gained access to the Waiver Documents by invoking other means or theories, such as the crime or fraud exception to the attorney-client privilege. The DOJ posed this very possibility in its response to Qwest's mandamus petition. *See* DOJ Resp. Br. at 2 n.1.

Further, if selective waiver were as essential to government operations as Qwest claims, it would seem the agencies would support Qwest's position. At the court's request, the DOJ responded to Qwest's petition.[4] Rather than urging the adoption of selective waiver, though, it carefully took no position on the parties' dispute. Additionally, the DOJ declined an invitation to participate in oral argument. It would appear, then, that the government's interest is not as Qwest portrays it.[5]

2. Confidentiality Agreements

Qwest also contends the key point distinguishing this case from the majority of the cases rejecting selective waiver is the fact that Qwest entered into confidentiality agreements with the agencies prior to disclosing the Waiver Documents. Some courts have held or indicated that the existence of a confidentiality agreement is irrelevant to a waiver of privileges. *See, e.g., Columbia/HCA Healthcare*, 293 F.3d at 303; *Chrysler Motors Corp.*, 860 F.2d at 847. Others, however,

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[4] The court's order did not address the SEC. Unlike Association of Corporate Counsel and the Chamber of Commerce of the United States of America, the SEC did not file an amicus brief in this action.

[5] Qwest's confidentiality agreements provided that the agencies would not assert that production of the Waiver Documents constituted a waiver, as to a third party, of the attorney-client privilege, the work-product doctrine, or any other applicable privilege. *See* Pet'r Br., Ex. B at 2; *id.* Ex. C at 2. This restriction, however, does not prohibit the agencies from arguing in *favor* of a theory of selective waiver.

have indicated that the existence of a confidentiality agreement may justify adopting selective waiver. *See, e.g., Steinhardt Partners*, 9 F.3d at 236; *M & L Bus. Mach. Co.*, 161 B.R. at 696.

The record does not support reliance on the Qwest agreements with the SEC and the DOJ to justify selective waiver. The agreements do little to restrict the agencies' use of the materials they received from Qwest. The agencies are permitted to use the Waiver Documents as required by law and in furtherance of the discharge of their obligations. The DOJ is specifically permitted to share the Waiver Documents with other agencies, federal, state, and local, and make use of them in proceedings and investigations. In its brief, the DOJ illustrates just how far some of the documents may have traveled, stating that, at a minimum, Waiver Documents have been introduced into evidence in a criminal trial, produced as discovery in three separate criminal proceedings, and used as exhibits to SEC investigative testimony. The DOJ also informs us it was not required to "segregate material obtained from Qwest, file it under seal, keep records of its use, or otherwise deal with the information in any special way," and it had made no effort to determine what information had been disseminated to third parties. DOJ Resp. Br. at 6.

The record does not indicate whether Qwest negotiated or could have negotiated for more protection for the Waiver Documents, or whether, as it asserted at oral argument, seeking further restrictions would have so diluted its cooperation to render it valueless. Be that as it may, the confidentiality agreements gave the agencies broad discretion to use the Waiver Documents as they saw fit, and any restrictions on their use were loose in practice. As Qwest has conceded, it is unknown how many or which of the Waiver Documents the agencies have used or disclosed, how those uses or disclosures occurred, who might have had access to the Waiver Documents, and the extent of continuing disclosures. It is

therefore not inappropriate to conclude that some undetermined number of Waiver Documents have been widely disseminated and have thus become public information.

At oral argument, Qwest essentially conceded that those widely distributed Waiver Documents have lost any protection they once enjoyed. In so conceding, Qwest is effectively advocating a rule that would place control of its attorney-client privilege and work-product protection in the hands of the agencies. Under this rule, the agencies would determine which documents would remain privileged or protected by limitation on further dissemination. The concession highlights a further record deficiency: the nature and severity of the burden placed upon the district court to sort through all 220,000 pages of Waiver Documents to determine what use the government made of each document, and whether any further disclosure had vitiated an otherwise applicable privilege or protection.

In short, Qwest's confidentiality agreements do not support adoption of selective waiver.

3. Purpose of Protections

The Supreme Court has required caution in the arena of testimonial privileges: "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Because exceptions to the waiver rules necessarily broaden the reach of the privilege or protection, selective waiver must be viewed with caution. If the suggested exception advances the purpose of the privilege or protection, that exception should be viewed more favorably.

The generally recognized exceptions already in place tend to serve the purposes of the particular privilege or protection. When disclosure is necessary to accomplish the consultation or assist with the representation, as in the case of an inter-

preter, translator, or secretary, an exception to waiver preserves the privilege. *See Mass. Inst. of Tech.*, 129 F.3d at 684; *Westinghouse*, 951 F.2d at 1424. Similarly, when the disclosure is to a party with a common interest, the "joint defense" or "common interest" doctrine provides an exception to waiver because disclosure advances the representation of the party and the attorney's preparation of the case. *See Westinghouse*, 951 F.2d at 1424; *see also Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1042-43 (10th Cir. 1998) (stating that establishing joint-defense privilege requires showing "(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort").

The record in this case does not indicate that the proposed exception would promote the purposes of the attorney-client privilege or work-product doctrine.[6] Rather than promoting exchange between attorney and client, selective waiver could have the opposite effect of inhibiting such communication. If officers and employees know their employer could disclose privileged information to the government without risking a further waiver of the attorney-client privilege, they may well choose not to engage the attorney or do so guardedly. Such reticence and caution could be heightened where, as here, further disclosures by the government mean that the information may be disclosed to countless others.

Moreover, the purpose of the work-product doctrine is to enable counsel to prepare a case in privacy. As other circuits have indicated, selective waiver does little to further this purpose and in some cases, may instead encourage counsel to conduct investigations with an eye toward pleasing the gov-

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[6] Among the authorities advocating the adoption of selective waiver, including *Diversified*, Judge Boggs' dissent in *Columbia/HCA Healthcare*, and the SEC's position expressed in amicus briefs filed in other cases, none of their rationales appear to be premised on the purposes underlying the attorney-client privilege and work-product doctrine.

ernment. *See Columbia/HCA Healthcare*, 293 F.3d at 306; *Westinghouse*, 951 F.2d at 1429-30; *Steinhardt Partners*, 9 F.3d at 235.

4. Unfairness to the Parties

Qwest argues that adopting selective waiver would avoid unfairness to Qwest while visiting no unfairness on the Plaintiffs. If companies do not have the assurance of protection, Qwest theorizes, they simply will not release privileged documents to federal authorities. Thus, civil plaintiffs will not have access to them anyway. *See Columbia/HCA Healthcare*, 293 F.3d at 312 (Boggs, J., dissenting) ("[T]he choice presented in this case is not one whether or not to release privileged information to private parties that has already been disclosed to the government, but rather one to create incentives that permit voluntary disclosures to the government at all."); *Westinghouse*, 951 F.2d at 1426 n.13 ("[I]n our view, when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred."). Allowing Qwest to choose who among its opponents would be privy to the Waiver Documents is far from a universally accepted perspective of fairness. *See Permian Corp.*, 665 F.2d at 1221; *John Doe Corp.*, 675 F.2d at 489.

As discussed above, the record is silent on whether selective waiver truly is necessary to achieve cooperation. Qwest's fairness argument nevertheless rests on that very foundation. It is difficult to understand how a rejection of selective waiver will work an unfairness on Qwest when Qwest disclosed the Waiver Documents in the face of the known threat from Plaintiffs, the absence of Tenth Circuit precedent, and a dearth of favorable circuit authority. It hedged its bets by choosing to release 220,000 pages of documents but to retain another 390,000 pages of privileged documents. Qwest per-

ceived an obvious benefit from its disclosures but did so while weighing the risk of waiver.

In sum, the record does not support application of selective waiver as a matter of fairness.

5. Case Law

As a review of federal circuit case law has indicated, there is but one circuit that has applied the selective waiver doctrine to attorney-client material. All other circuits addressing the matter have refused to apply the doctrine. In the context of non-opinion work product, no circuit has adopted selective waiver and five circuits have rejected the doctrine. Some circuits have expressly not precluded the application of selective waiver but have limited that possibility to cases where the initial disclosure was not to an adversary or was accomplished under a confidentiality agreement strictly limiting further dissemination by the government. Here, Qwest disclosed to adversaries under agreements which did not realistically control further dissemination.

The only conclusion from the federal case law is that the federal circuits have not expanded either the attorney-client privilege under Federal Rule of Evidence 501 or the non-opinion work-product doctrine under Fed. R. Civ. P. 26(b)(3) or *Hickman v. Taylor* by applying selective waiver.

A review of state appellate decisions yields substantially the same conclusion.[7] *See McKesson Corp. v. Green*, 610 S.E.2d 54, 56 (Ga. 2005) (rejecting selective waiver of work-product protection where materials were disclosed to government, despite confidentiality agreement); *McKesson HBOC,*

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[7] The Supreme Court has "observed that the policy decisions of the States bear on the question whether federal courts should [ ] amend the coverage of an existing [privilege]." *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996); *see also Trammel v. United States*, 445 U.S. 40, 48-50 (1980); *United States v. Gillock*, 445 U.S. 360, 368 (1980).

Inc. v. Superior Court, 9 Cal. Rptr. 3d 812, 819, 821 (Cal. Ct. App. 2004) (rejecting selective waiver of attorney-client privilege and work-product protection where materials were disclosed to government, despite confidentiality agreement); *State v. Thompson*, 306 N.W.2d 841, 843 (Minn. 1981) (finding "no occasion" to apply selective waiver and suppress testimony where the attorney-client privilege was waived through disclosure of investigation reports, notes, and statements to attorney-general and grand jury); *but see Danielson v. Superior Court*, 754 P.2d 1145 (Ariz. Ct. App. 1988) (adopting selective waiver of physician-patient privilege under the particular circumstances of that case). It is clear then that the common law of attorney-client privilege and the work-product doctrine in both state and federal courts has not embraced the doctrine of selective waiver.

6. New Privilege

While Qwest has disavowed any intention of seeking to create a new privilege for materials surrendered in a government investigation, that does not necessarily foreclose the subject. There is a principled position that the breadth of the selective waiver doctrine advocated by Qwest is the substantial equivalent of a new privilege. Qwest justifies its proposed new rule on a policy of cooperation with government investigations. It does not ground its advocacy on the purposes underlying the attorney-client privilege. At least one court has indicated that such justification is suggestive of a new privilege, rather than gloss on an ancient one. *See Westinghouse*, 951 F.2d at 1425.

More often than not, the Supreme Court has declined to recognize new privileges. In *Branzburg*, for example, the Court rejected a proposed journalists' privilege against being compelled to testify before a grand jury. 408 U.S. at 667. In reaching its decision, the Court noted the proposed privilege was not recognized at common law, *id.* at 685; some states had adopted it, but the majority had not, and that no federal

statute had adopted it, *id.* at 689; the evidence did not support the dire consequences the privilege's proponents predicted, *id.* at 693; even if the record had supported the need for the privilege, the public interest of pursuing and punishing criminal behavior would outweigh the interest in possible future news stories, *id.* at 695; and there were daunting logistical difficulties in implementing the proposed privilege, *id.* at 703-04. The Court suggested other government bodies, such as Congress or the state legislatures and courts, could consider implementing the proposed privilege. *Id.* at 706.

In other cases, the Court has refused to adopt privileges for peer review materials, *see Univ. of Pa.*, 493 U.S. at 189; for state legislators in federal criminal proceedings, *see United States v. Gillock*, 445 U.S. 360, 374 (1980); for the editorial processes of the media in defamation action, *see Herbert v. Lando*, 441 U.S. 153, 175 (1979); for the President to refuse to produce materials in a criminal proceeding, *see Nixon*, 418 U.S. at 713; and for legislative aides to refuse to testify before a grand jury about actions not related to legislative activities, *see Gravel v. United States*, 408 U.S. 606, 627 (1972); *see also Rubin v. United States*, 525 U.S. 990, 119 S. Ct. 461, 464 (1998) (Breyer, J., dissenting from denial of certiorari in case in which the appellate court rejected a privilege for Secret Service agents for information learned while protecting the President).

A notable exception to this trend is *Jaffee v. Redmond*, where the Court recognized a federal psychotherapist-patient privilege under Rule 501. 518 U.S. 1, 9-15 (1996). Noting that the possibility of disclosure might impede successful treatment, it concluded the privilege promoted the important public interest in the treatment of mental and emotional problems. *Id.* at 11. The Court weighed the significant benefits of the rule with the "modest" evidentiary detriment, finding that in the absence of the privilege, much of the evidence that would otherwise be discoverable would not

come into existence. *Id.* at 11-12. Importantly, though, it also relied upon a consensus of "reason and experience" reflected in the adoption of a psychotherapist privilege, in some form, in all fifty states and the District of Columbia. *Id.* at 12 & n.11, 13. In addition, it noted that a psychotherapist privilege was among the nine privileges originally proposed to be included in the Federal Rules of Evidence. *Id.* at 14-15.

In this case, there are no grounds to buck the trend of declining to create a new privilege. There is no groundswell in the state legislatures for a privilege for materials produced in a government investigation.[8] Nor was such a privilege

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[8] It does not appear that any state has implemented, by statute or rule, a general government-investigation privilege, and this type of privilege does not appear in the Uniform Rules of Evidence (Uniform Rules). The closest equivalents recognized in the states appear to be a privilege for reports required to be made by law, which has been adopted by only a small minority of states, *see* Alaska R. Evid. 502; Haw. Rev. Stat. § 626-1, R. 502; Nev. Rev. Stat. § 49.025; N.M. R. Rev. Rule 11-502; Tex. R. Evid. 502; Wis. Stat. § 905.02, and self-critical analysis privileges recognized for specified situations in a minority of states, *see, e.g.*, Alaska Stat. § 09.25.450 (environmental audit); Colo. Rev. Stat. § 13-25-126.5 (environmental audit); 215 Ill. Comp. Stat. 5/155.35 (insurance compliance); Kan. Stat. Ann. § 60-3351 (insurance compliance); *id.* § 60-3333 (environmental audit); Miss. Code Ann. § 49-2-71 (environmental audit); N.D. Cent. Code §§ 6-13-02 to 6-13-04 (financial institutions); *id.* §§ 26.1-51-02 to 26.1-51-04 (insurance compliance); Or. Rev. Stat. § 731.761 (insurance compliance); Tex. Rev. Civ. Stat. Ann., art. 4447cc, § 5 (Vernon) (environmental audit); Utah R. Evid. 508 (environmental audit). Neither of these privileges is included in the Uniform Rules.

Notably, the Uniform Rules are hostile to both the creation of new common law privileges, *see* Unif. R. Evid. 501 (limiting the creation of privileges to constitution, statute, or state supreme court rule), and the idea of selective waiver, *see* Unif. R. Evid. 510 (stating that a privilege is waived if a privilege holder "voluntarily discloses or consents to disclosure of any significant part of the privileged matter"). A majority of states have adopted forms of Uniform Rules 501 and/or 510. *See Uniform Rules of Evidence Locator*, http://www.law.cornell.edu/uniform/evidence.html

among the nine originally proposed for inclusion in the Federal Rules of Evidence. Further, the Supreme Court has indicated it is "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Univ. of Pa.*, 493 U.S. at 189. In 1984, Congress rejected a SEC-proposed amendment to the Securities and Exchange Act of 1934 that would have established a selective waiver rule. *See Westinghouse*, 951 F.2d at 1425 (citing 16 Sec. Reg. & L. Rep. 461 (Mar. 2, 1984)). More recently, the SEC withdrew a proposed regulation implementing selective waiver in light of questions about its authority to adopt such a regulation under the Sarbanes Oxley Act. *See* SEC Release Nos. 33-8185, 34-47276, *Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (explaining withdrawal of 17 C.F.R. Part 205.3(e)(3)). All of these factors counsel against establishing a new government-investigation privilege and correspond-

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(last visited May 31, 2006) (identifying states that have adopted the Uniform Rules).

In addition, our research indicates that where state legislatures have adopted selective waiver theories, they have done so not in the general law enforcement context, but in particularized circumstances not present here. *See, e.g.*, Cal. Gov't Code § 13954(h) (disclosures to verify claims on victims' compensation fund); Conn. Gen. Stat. § 19a-127o(f) (health providers' submission of patient safety work product to patient safety organization); Fla. Stat. § 633.175(6) (insurance company providing information to State Fire Marshal); La. Rev. Stat. Ann. § 40:31.66(D) (state Parkinson's Disease Registry); Neb. Rev. Stat. § 44-1107(5)(f) (examinations under Viatical Settlements Act); Ohio Rev. Code Ann. § 1753.38(A) (risk-based capital plans, reports and information). Most commonly, state legislatures have allowed selective waiver in connection with environmental self-audits, *see, e.g.*, Alaska Stat. § 09.25.455(b); Kan. Stat. Ann. § 60-3334(c); Tex. Rev. Civ. Stat. Ann., art. 4447cc, § 6(b) (Vernon), and reports to insurance commissioners, *see, e.g.*, Ind. Code § 27-1-15.6-15(e)(4); Ky. Rev. Stat. Ann. § 304.47-055(4); S.C. Code Ann. § 38-43-55(G)(4); Vt. Stat. Ann. tit. 8, § 4813m(f)(4); Wash. Rev. Code §§ 48.02.065(4), (6).

ingly counsel against adopting Qwest's proposed rule regardless of whether it be characterized as a new privilege or a new rule governing waiver.

7. Culture of Waiver

Amici curiae, Association of Corporate Counsel and the Chamber of Commerce of the United States of America, support Qwest's position by suggesting their employers and members, respectively, now litigate in a "culture of waiver" instituted by federal prosecutors. They argue that companies facing federal investigations do not choose to waive their privileges; under current enforcement standards, companies cannot risk being labeled as uncooperative; and cooperation, as defined by federal officials, requires producing privileged documents.[9] Amici state that "the demand for privilege waivers by the government as a pre-requisite to fair treatment by prosecutors is now routine." Amici Br. at 10. They urge the court "to note with disapproval this culture of waiver as a matter of policy that should be reversed." *Id.* at 8.

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[9] The DOJ's enforcement position stems from certain DOJ memoranda. The 1999 "Holder Memorandum" written by Deputy Attorney General Eric Holder directed federal prosecutors to consider the company's willingness to waive privileges in evaluating cooperation. The currently controlling memorandum is the January 20, 2003 "Thompson Memorandum" authored by Deputy Attorney General Larry D. Thompson. On October 21, 2005, Acting Deputy Attorney General Robert D. McCallum, Jr. issued a memorandum supplementing the Thompson Memorandum that directs United States Attorneys to establish a written waiver review process prosecutors must follow in seeking privilege waivers.

The SEC's position is encapsulated in the "Seaboard Report," Securities Exchange Act of 1934 Release No. 44969 (Oct. 23, 2001). That report listed a company's desire to provide information as one of the criteria for assessing cooperation, and it noted that such a desire may cause companies to waive the attorney-client privilege, work-product doctrine, or other applicable privileges. "In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff." *Id.* at n.3.

Amici's position is supported by commentators. *See, e.g.*, Ronald C. Minkoff, *A Leak in the Dike: Expanding the Doctrine of Waiver of the Attorney-Client Privilege*, 154 PLI/NY 165, 178 (2005); *see also* Kathryn Keneally, *New Life for Selective Waiver*, 30 Champion 42 (2006). It is not, however, supported by the record. Aside from the anecdotal material serving as the foundation for the purported "culture of waiver," the record is silent regarding its existence, significance, and longevity. More specifically, the record is silent about Qwest's particular dealings with the agencies and whether it experienced the tactics deplored by amici. Even though common sense and human nature suggest there is some level of pressure for companies to satisfy the government by disclosing as much as possible, including even privileged and protected material, this court cannot rely on such a sparse record to recognize a new doctrine of selective waiver or to create a new privilege for government investigations.

A similar argument has been unsympathetically received by at least one other circuit. The Second Circuit stated:

> Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliché, the "Hobson's choice" argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.

Steinhardt Partners, 9 F.3d at 236. In *Branzburg*, the Supreme Court found similar arguments about changing policies and practices insufficient to support the creation of a journalist's privilege:

> It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and

> officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources . . . . These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere.

408 U.S. at 699 (footnote omitted).

At least to the degree exhorted by amici, "the culture of waiver" appears to be of relatively recent vintage. Whether the pressures facing corporations in federal investigations present a hardened, entrenched problem suitable for common-law intervention or merely a passing phenomenon that may soon be addressed in other venues is unclear. For example, certain language in Application Note 12 to Sentencing Guideline § 8C2.5 can be read to tie cooperation to a waiver of applicable privileges. The Sentencing Commission, however, recently promulgated an amendment deleting that language because "the sentence at issue could be misinterpreted to encourage waivers." *Sentencing Guidelines for the United States Courts*, 71 Fed. Reg. 28063, 28073 (May 1, 2006). This amendment will take effect on November 1, 2006 unless Congress intervenes. *Id.* at 28063. Congress also appears concerned about these issues; the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security recently took oral testimony at an oversight hearing on corporate privilege waivers. *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers: Oversight Hearing Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism and Homeland Security*, 109th Cong. D193 (Mar. 7, 2006). Finally, the Advisory Committee on Evidence Rules recently voted to recommend publication of a proposed Rule 502, providing for selective waiver to the Committee on Rules of Practice and Procedure (the Standing Committee) of the Judicial Con-

ference of the United States. The Standing Committee is expected to take up the issue at its June 2006 meeting.

Rule 501 places responsibility for development of the common law of testimonial privilege on the federal courts. Each decision along the path of the common law is directed by the discrete, underlying facts developed in the record. As decisions accrue, the process is facilitated by the accumulation of experience, but it remains dependent on the factual foundation of each constituent decision. Legislative and rule-making processes, however, are not confined by the same gradual, brick-by-brick progression. Legislatures and rule-making bodies are endowed with tools to marshal evidence, facts, and experience from numerous and diverse sources that can support more dramatic and immediate creation of new rules or modifications of old rules. *Cf. In re Subpoena Duces Tecum*, 738 F.2d at 1375 ("If a change is to be made because it is thought that such voluntary disclosure programs are so important that they deserve special treatment, that is a policy matter for the Congress, or perhaps through the SEC (through a regulation). Courts are not the appropriate forum—for one thing, courts do not know enough—to decide on policy grounds to treat those programs (or others like them) in an exceptional way."); *see also Branzburg*, 408 U.S. at 706 ("Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.").

Whether a rule-making or legislative venue is appropriate to address the issues raised by Qwest and amici is a question for the Standing Committee and Congress. The rule-making and legislative processes, however, need not proceed wholly independent of the common law. The accumulated experience of federal common law in the area of attorney-client privilege

and work-product protection is but another source for the legislative and rule-making bodies to draw on to inform their deliberations concerning the need for and parameters of selective waiver or a new privilege.

III. Conclusion

For the reasons discussed above, the record in this case does not justify adoption of selective waiver. Consequently, the district court did not abuse its discretion in ordering Qwest to produce the Waiver Documents to the Plaintiffs. Qwest has not shown a clear and indisputable right to a writ of mandamus, and therefore its petition is DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

[Filed August 15, 2005]

Civil Case No. 01-cv 01451-REB-CBS
(Consolidated with Civil Action Nos. 01-cv 01472-REB-CBS, 01-cv 01527-REB-CBS, 01-cv-01616-REB-CBS, 01-cv-01799-REB-CBS, 01-cv-01930-REB-CBS, 02-cv-00333-REB-CBS, 02-cv-00374-REB-CBS, 02-cv-00507-REB-CBS, 02-cv-00658-REB-CBS, 02-cv-00755-REB-CBS; 02-cv-00798-REB-CBS; and 04-cv-00238-REB-CBS)

In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

ORDER CONCERNING RULE 72 OBJECTIONS

Blackburn, J

This matter is before me on two FED. R. CIV. P. 72 objections to orders entered by Magistrate Judge Shaffer: 1) lead plaintiffs' objection [#647], filed May 3, 2005, to Judge Shaffer's April 19, 2005, order; and 2) Qwest Communications' objection [#691], filed June 14, 2005, to Judge Shaffer's May 31, 2005, order. Under 28 U.S.C. § 636 (b) and FED. R. CIV. P. 72 (a), I may modify or set aside any portion of a magistrate judge's order which I find to be "clearly erroneous or contrary to law."

I. APRIL 19, 2005, ORDER

Judge Shaffer's April 19, 2005, order concerns the lead plaintiffs' motion to compel discovery relevant to the advice of counsel defense asserted by some of the individual

defendants. Some of the discovery potentially at issue in this motion includes documents that may fall within Qwest's attorney client and work-product privileges. Judge Shaffer denied the motion to compel without prejudice, and directed that the parties engage in certain actions that will help to focus the factual and legal issues relevant to this motion. In essence, the plaintiffs argue that they are entitled to have their motion to compel granted immediately. I conclude that Judge Shaffer has ordered the parties to follow a procedural protocol that is carefully designed and crafted to reach a well focused and timely resolution of a complex issue. Judge Shaffer's approach well serves the goal of securing "the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. I conclude that Judge Shaffer's April 19, 2005, order is not clearly erroneous or contrary to law.

II. MAY 31, 2005, ORDER

In his May 31, 2005, order, Judge Shaffer ordered Qwest to produce two groups of documents. First, he ordered Qwest to produce documents that Qwest had provided to government agencies that were investigating Qwest. Qwest has refused to produce these documents to the plaintiffs, asserting claims of attorney-client privilege and work-product privilege. Second, Judge Shaffer also ordered Qwest to produce a draft report, dated March 21, 2002, and a final report, dated March 29, 2002, prepared by Qwest's outside counsel, Boies, Schiler [*sic*] & Flexner. I will refer to these documents collectively as the BSF Report. Qwest has refused to produce the BSF Report, asserting claims of attorney-client privilege and work-product privilege.

With regard to the first group of documents, Judge Shaffer concluded that Qwest waived its attorney-client and work-product privileges as to these documents when Qwest disclosed the documents to the government agencies. I agree with Judge Shaffer's analysis of the facts and the law on this issue. I find that Judge Shaffer's, May 31, 2005, order that

Qwest produce documents that Qwest had provided to government agencies that were investigating Qwest is not clearly erroneous or contrary to law.

Judge Shaffer concluded also that Qwest had waived its attorney-client and work-product privileges as to the Boies, Schiler [*sic*] & Flexner Report (BSF Report) because Qwest's then Controller, Brian Treadway, had disclosed the contents of the report to Qwest's then auditor, Mark Iwan, of Aurther Andersen. In addition, Judge Shaffer concluded that Qwest waived its privileges as to the BSF Report when Qwest produced to the plaintiffs a memo written by Iwan that contained a summary of the conclusions in the Report. To the extent Judge Shaffer concluded that Qwest waived the protections given to opinion work-product in the BSF Report, I respectfully disagree. On this point, I reiterate the opinion work-product analysis I used in resolving a nearly identical issue in ***U.S. v. Graham***, No. 03-CR-089-RB (D. Colo.) (order re: motion to quash [#261], filed December 2, 2003). Otherwise, I find that Judge Shaffer's May 31, 2005, order is not clearly erroneous or contrary to law.

A. Work-Product Privilege

The work-product privilege protects from compelled disclosure "writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." ***Hickman v. Taylor***, 329 U.S. 495, 508 (1947). The work-product privilege is based on the recognition that

> [p]roper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. This is the historical and the necessary way in which lawyers act within the framework of our system or jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course,

> in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . .

Id. at 511. The work-product privilege is broader than the attorney-client privilege. ***See, e.g., In re Sealed Case***, 676 F.2d 793, 809-09 (D.C. Cir. 1982). Like the attorney-client privilege, the work-product privilege applies equally to civil and criminal proceedings. ***United States v. Nobles***, 422 U.S. 225, 238 (1975).

There are two kinds of protected work-product: "fact" (or non-opinion) work-product and "opinion" work-product. ***Frontier Refining Inc. v. Gorma-Rupp Co.***, 136 F.3d 695, 704 n.12 (10th Cir. 1998). Disclosure of fact work-product may only be obtained by a third party who satisfies the "substantial need/undue burden test" by demonstrating 1) a substantial need for the material; and 2) an inability to develop the information otherwise without undue hardship. ***E.g., id.*** at 702-03. In contrast, opinion work-product is subject to enhanced and heightened protection, which approaches absolute protection. *See, e.g.*, ***In re Cendant Corp. Sec. Litig.***, 2003 WL 22133429, At *5 (3d Cir. 2003); ***United Kingdom v. United States***, 238 F.3d 1312, 1322 (11th Cir. 2001); ***Baker v. General Motors Corp.***, 209 F.3d 1051, 1054 (8th Cir. 2000); ***Chaudhry v. Gallerizzo***, 174 F.3d 394, *403 (4th Cir. 1999); ***cf. Upjohn***, 449 U.S. at 401 (holding that opinion work-product "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship"); ***Hickman***, 329 U.S. at 508 ("If there should be a rare situation justifying production of [attorney interviews of witnesses], petitioner's case is not of that type."); ***Holmegren v. State Farm Mut. Auto Ins. Co.***, 976 F.2d 573, 577 (9th Cir. 1992) (holding that opinion work-product may be discovered only where mental impressions are at issue and need for material is compelling); ***In re Sealed Case***, 676 F.2d 793, 809-10 (D.C. Cir. 1982).

The courts have generally and consistently recognized a difference between fact work-product and opinion work-product. ***See generally* 6 Moore's Federal Practice § 26.70[5][b], [e] (Daniel R. Coquillette et al. eds., 3d ed.1997)**. The circuits are divided on whether there is absolute protection for opinion work-product. Some courts have held that opinion work-product is absolutely protected; others have concluded it maybe discovered under compelling circumstances. ***Compare Holmgren v. State Farm Mut. Auto. Ins. Co.***, 976 F.2d 573, 577 (9th Cir.1992) (holding opinion work-product maybe discovered only when mental impressions are at issue and need for material is compelling), ***and In re Sealed Case***, 676 F.2d 793, 809-10 (D.C.Cir.1982) (requiring showing of extraordinary justification to overcome protection of opinion work-product), ***with Duplan Corp. v. Moulinage et Retorderie de Chavanoz***, 509 F.2d 730, 735 (4th Cir.1974) (holding opinion work-product to be absolutely protected). The Supreme Court has not yet decided whether opinion work-product is absolutely immune from discovery. ***Cf. Upjohn Co. v. United States***, 449 U.S. 383, 401-02, 101 S.Ct. 677, 688-89 (1981) (declining to decide whether any showing of necessity can overcome opinion work-product protection, but stating that showing of substantial need and inability to obtain information without undue hardship is insufficient to compel disclosure).

Attorney work-product summarizing oral statements from or interviews of witnesses, such as the witness interviews in the BSF Report, may constitute opinion work-product. ***See, e.g. Upjohn***, 449 U.S. at 401-02; ***In re Sealed Case***, 856 F.2d 268, 273 (D.C. Cir. 1988); ***In re Grand Jury Investigation***, 599 F.2d 1224, 1231 (3d Cir. 1979), ***cited in Upjohn***, 449 U.S. at 401; ***In re Grand Jury Proceedings***, 473 F.2d 840, 848 (8th Cir. 1973), ***cited in Upjohn***, 449 U.S. at 401; ***In re Grand Jury Investigation***, 412 F. Supp. 943, 94 (E.D. Pa. 1976), ***cited in Upjohn***, 449 U.S. at 401. Assuming *arguendo* that the Tenth Circuit would hold that opinion work-product

is not absolutely protected, still the plaintiffs have not satisfied their heavy and enhanced burden to establish either that the mental impressions of the attorneys are at issue, or that an extraordinary or a compelling justification beyond substantial need/undue burden exists.

B. Waiver

A privilege holder may waive the attorney-client privilege or the work-product privilege by implication under the common law doctrine of implied waiver. ***E.g., In re Sealed Case***, 676 F.2d 793, 807 (D.C. Cir. 1982). However, because of the different purposes central to the two privileges, the rules governing waiver differ for each privilege. The work-product privilege exists to "promote the adversary system by safeguarding the fruits of an attorneys trial preparations from the discovery attempts of the opponent." ***United States v. American Tel. & Tel. Co.***, 642 F.2d 1285, 1298 (D.C. Cir. 1980). Contrastingly, the attorney-client privilege exists to protect a confidential relationship. ***Id.***

The subject-matter waiver rule apposite to the attorney-client privilege provides that a client's voluntary disclosure of documents otherwise protected by the attorney-client privilege breaches the confidentiality of the attorney-client relationship and effects a waiver of the privilege not only as to the disclosed documents, but also as to all documents relating to the subject matter of the disclosed documents. ***See, e.g., In re Sealed Case***, 676 F.2d at 809; ***Roberts Aircraft Co. v. Kern***, 1997 WL524894, at *4 (D. Colo. 1997). The subject-matter waiver rule for the work-product privilege is significantly more limited. "[B]ecause [the work-product privilege] looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work-product privilege is not automatically waived by any disclosure to a third party. . . . The purposes of the work-product privilege are more complex [than the attorney-client privilege], and they are not inconsistent with selective disclosure—even in

some circumstances to an adversary." ***In re Sealed Case***, 676 F.2d at 809, 818. *A fortiori*, the subject-matter waiver rule does not extend to opinion work-product. ***Cox v. Administrator United States Steel & Carnegie***, 17 F.3d 1386, 1422-23 (11th Cir. 1994); ***In re Martin Marietta Corp.***, 856 F.2d 619, 626 (4th Cir. 1988).

C. Conclusion

The BSF Report was created by Qwest attorneys, *inter alia*, to summarize oral statements made by Qwest employees. Accordingly, they are ostensibly, if not presumptively, opinion work-product. ***See, e.g., Upjohn***, 449 U.S. at 401; ***Sealed Case***, 856 F.2d at 273. However, additional analysis of the records sought by the plaintiffs is necessary to discern their quintessential character. In attempting to differentiate between "fact" and "opinion" work-product in the context of documents and information relating to or resulting from employee interviews conducted by employer counsel, the analysis employed by the Fourth Circuit in ***In re Martin Marietta Corp.*** is heuristic. There, the Fourth Circuit distinguished between "fact" (or non-opinion) work-product which may be ordered produced if counsel has waived work-product protection, and "opinion" work-product consisting of "pure mental impressions severable from the underlying data and arguably not subject to subject matter waiver." ***In re Martin Marietta Corp.***, 856 F.2d at 626.

Thus, to the extent that during the interviews reflected in the BSF Report an attorney made contemporaneous notes which purport to report or record, either in whole or in part by direct quote or paraphrase, statements made by a witness, then those statements constitute "fact" work-product subject to discovery, as opposed to "opinion" work-product, which consists of the mental or thought processes of an attorney, which, for good reason, are not subject to disclosure. ***Id.*** Thus, if the statement was recorded to preserve it as representing what the witness said as opposed to what the

attorney thought about what the witness said, then it is "fact," not "opinion" work-product. ***Id.*** The legal significance of the distinction is twofold: 1) "fact" work-product is subject to the subject matter waiver rule, while "opinion" work-product is not; and 2) "fact" work-product has evidentiary value for either substantive (necessary to the construction of a defense) or impeachment (necessary to the impugnment of witness veracity) purposes, while "opinion" work-product has no intrinsic evidentiary value, but instead, represents expressions of attorney ratiocination or legal theory. ***Id.*** In other words where the attorney was acting as scrivener, not as analyst, then the resulting recorded statement constitutes "fact" work-product subject to subject matter waiver. ***Id.***

Admittedly, there will be many instances when notes prepared by an attorney during a witness interview will contain both "fact" and "opinion" work-product. Therefore, to preserve the plaintiffs' right to discover "fact" work-product when subject matter waiver has occurred while simultaneously preserving the right of an attorney to preserve inviolate "opinion" work-product, the "opinion" work-product must be separated by redaction from the "fact" work-product. The question then becomes who should perform the redaction: the attorney or the court? The initial reaction is to conclude that the court should serve as editor to eschew opportunity by an attorney to redact or excise too much to the detriment of the plaintiffs. This *per force* assumes that the attorney will be dissembling in his role as editor. However, if this assumption is correct, then having the court serve as editor does not ameliorate the problem because the dissembling attorney will simply withhold *en toto* those documents which reveal too much. Thus, assuming *arguendo* that the attorney-editor will discharge his editorial duties as an officer of the court consistent with the apposite ethical requirements and court orders, there is no reason for the court to undertake or superintend the redaction *in camera.* Having an attorney-editor eschews the inefficiencies inherent to an *in camera*

review by the court, which is detrimental both to considerations of judicial economy constrained by limited judicial resources and of preservation of the documents in some safe place to be provided by the court.

In sum, by disclosing the BSF Report to Iwan, Qwest has impliedly waived the work-product privilege as to all "fact" (or non-opinion) work-product on the same subject matter as that disclosed in the memoranda. However, Qwest has not waived the work-product privilege as to "opinion" work-product in the BSF Report. To the extent Judge Shaffer concluded that Qwest had waived the protection of opinion work-product, I conclude that his order [#671], filed May31, 2005, is contrary to law.

III. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That lead plaintiffs' objection [# 647], filed May 3, 2005, to Judge Shaffer's April 19, 2005, order, is **OVERRULED and DENIED**;

2. That Qwest Communications' objection [# 691], filed June 14, 2005, to Judge Shaffer's May 31, 2005, order, is **SUSTAINED** to the extent Judge Shaffer concluded that Qwest has waived the protection of opinion work-product reflected in the BSF Report;

3. That accordingly, the portion of paragraph (b) on page 12 of Judge Shaffer's order [#671], filed May 31, 2005, that requires Qwest to produce the BSF Report is **VACATED** to the extent that paragraph requires production of material in the BSF Report which constitutes opinion work-product;

4. That counsel for Qwest, acting as officers of the court, **SHALL REVIEW** the draft report, dated March 21, 2002, and the final report, dated March 29, 2002, prepared by Qwest's outside counsel, Boies, Schiler [*sic*] & Flexner (BSF Report), and **SHALL REDACT** from the BSF Report all

matter that constitutes "opinion" work-product, as defined in this order;

5. That after such redaction and on or before **September 9, 2005**, Qwest **SHALL PRODUCE** to plaintiffs all portions of the BSF Report that constitute "fact" (or non-opinion) work-product, as defined in this order;

6. That Qwest Communications' objection [#691], filed June 14, 2005, to Judge Shaffer's May 31, 2005, order, otherwise is **OVERRULED and DENIED**.

Dated August 15, 2005, at Denver, Colorado.

BY THE COURT:

/s/ Robert E. Blackburn
ROBERT E. BLACKBURN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

[Filed February 2, 2006]

Civil Case No. 01-cv-01451-REB-CBS
(Consolidated with Civil Action Nos. 01-cv-01472-REB-CBS, 01-cv-01527-REB-CBS, 01-cv-01616-REB-CBS, 01-cv-01799-REB-CBS, 01-cv-01930-REB-CBS, 02-cv-00333-REB-CBS, 02-cv-00374-REB-CBS, 02-cv-00507-REB-CBS, 02-cv-00658-REB-CBS, 02-cv-00755-REB-CBS; 02-cv-00798-REB-CBS; and 04-cv-00238-REB-CBS)

In re QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

ORDER CONCERNING QWEST'S RENEWED MOTION TO RECONSIDER & TO CERTIFY INTERLOCUTORY APPEAL

Blackburn, J

This matter before me is **Defendant Qwest Communications International Inc.'s Renewed Motion to Reconsider Part II of This Court's August 15, 2005 Order Concerning Rule 72 Objections and To Certify Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)** [#911], filed January 9, 2006. No response has been filed.[1] I grant the motion in part and deny it in part.

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[1] I am mindful of the representation by counsel for the movant that plaintiffs ". . . agree that the motion can be decided on the pleadings previously submitted by the parties." Renewed Motion at 2, n.2.

In an order [#671] filed May 31, 2005, Judge Shaffer ordered Qwest to produce 220,000 documents that Qwest had provided to the SEC under a written confidentiality agreement (the SEC documents), in the course of the SEC's investigation of Qwest. Qwest has refused to produce the SEC documents, asserting claims of attorney-client privilege and work-product privilege. Judge Shaffer concluded that Qwest had waived its attorney-client and work-product privileges when Qwest disclosed the SEC documents to the SEC. I upheld Judge Shaffer's order in my August 15, 2005, order [#778]. Qwest now asks that I reconsider and modify that order, and permit Qwest to redact opinion work product from the 220,000 SEC documents which I have ordered Qwest to produce.

There are three major grounds that justify reconsideration: (1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. ***Shields v. Sheller***, 120 F.R.D. 123, 126 (D.Colo.1988). However, "a motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple'" and make legal arguments that could have been raised before. ***Id.***

Qwest cites the substantial protections of opinion work product that I outlined in my August 15, 2005, order concerning other documents, and argues that those protections apply equally to the SEC documents. I agree that the protections for opinion work-product apply equally to the 220,000 SEC documents that I have ordered Qwest to produce. Nothing in the record demonstrates that Qwest has waived the protections of the opinion work product doctrine as to these documents. Therefore, I grant Qwest's motion to reconsider, and will order that Qwest redact opinion work product from these documents before they are produced to the plaintiffs. Such an order will correct clear error and will prevent manifest injustice.

Qwest also seeks an order certifying an interlocutory appeal to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1292(b). Qwest seeks to prosecute an interlocutory appeal of the court's ruling that production of privileged documents to the government, made under a written confidentiality agreement, constitutes a waiver of attorney-client and fact work product privileges as to third parties. This waiver analysis is the basis for the court's order that Qwest produce the 220,000 SEC documents. Qwest notes that the Tenth Circuit has not considered this issue, and that there is a split among the other circuit courts on this question.

Under § 1292(b), I may certify an appeal of an otherwise non-appealable order if I am

> of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .

28 U.S.C. § 1292(b). Appeal certification under § 1292(b) "should be limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action." ***State of Utah By and Through Utah State Dept. of Health v. Kennecott Corp.***, 14 F.3d 1489, 1495 (10th Cir. 1994) (citation and internal quotation omitted).

Although there may be substantial ground for difference of opinion concerning the court's waiver analysis as applied to the SEC documents, I conclude that this issue does not constitute a controlling question of law, and that an immediate appeal of my ruling will not materially advance the ultimate termination of this litigation. Resolution of this discovery issue will not make or break any of the plaintiffs' claims or any of the defendants' defenses. Unless resolution of this issue will have some substantial effect on the viability

of a claim or defense, I cannot conclude that this issue is a controlling issue in this case. Further, nothing in the record supports the conclusion that an immediate appeal of this issue would materially advance the termination of this case. For example, if Qwest's position were upheld by the Tenth Circuit, there is no indication that the plaintiffs' would abandon any of their claims or reach a settlement more quickly. Similarly, if the analysis adopted by Judge Shaffer and myself were upheld by the Tenth Circuit, there is no indication that Qwest would concede any of the plaintiffs' claims, or would reach a settlement more quickly. For the purpose of § 1292(b), the discovery question at issue here is not a controlling question of law and its immediate resolution will not materially advance the ultimate termination of this litigation.

THEREFORE, IT IS ORDERED as follows:

1. That **Defendant Qwest Communications International Inc.'s Renewed Motion to Reconsider Part II of This Court's August 15, 2005 Order Concerning Rule 72 Objections and To Certify Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)** [#911], filed January 9, 2006, is **GRANTED** in part to the extent that Qwest requests reconsideration and modification of my August 15, 2005, order [#778] upholding the Magistrate Judge's order directing Qwest to produce the SEC documents;

2. That counsel for Qwest, acting as officers of the court, **SHALL REVIEW** the SEC documents, and **SHALL REDACT** from those documents all matter that constitutes "opinion" work product, under the terms specified in my August 15, 2005, order [#778], concerning the redaction of opinion work product from the BSF Report;

3. That after such redaction and on or before March 15, 2006, or any extended deadline as determined by the Magistrate Judge, Qwest **SHALL PRODUCE** to the plaintiffs all portions of the SEC documents that do not constitute opinion work product; and

4. That **Defendant Qwest Communications International Inc.'s Renewed Motion to Reconsider Part II of This Court's August 15, 2005 Order Concerning Rule 72 Objections and To Certify Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)** [#911], filed January 9, 2006, otherwise is **DENIED**.

Dated February 2, 2006, at Denver, Colorado.

BY THE COURT:

/s/ Robert E. Blackburn
ROBERT E. BLACKBURN
United States District Judge

APPENDIX D

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER.

(1) *Initial Disclosures.* Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures— if any—are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) *Pretrial Disclosures.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to

other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) *Form of Disclosures; Filing*. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(5) *Methods to Discover Additional Matter*. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or

permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) *Limitations.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act

upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) *Trial Preparation: Materials*. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision, and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Timing and Sequence of Discovery*. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) *Supplementation of Disclosures and Responses*. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) *Meeting of Parties; Planning for Discovery.* Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging

the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

APPENDIX E

WILMER, CUTLER & PICKERING

February 11, 2003

Randall J. Fons, Esquire
Regional Director
United States Securities and Exchange Commission
Central Regional Office
1801 California Street, Suite 1500
Denver, Colorado 80202

Re: *In the Matter of Qwest Communications International Inc. (D-02445-A)*

Dear Mr. Fons:

Qwest Communications International Inc. (the "Company") and a Committee of its Board of Directors are in the process of conducting a review of the Company's accounting policies, its application of those polices to particular transactions, and various other matters related to its financial reporting. The Company and the Board have developed information end materials in connection with this review. In light of the interest of the Staff of the U.S. Securities and Exchange Commission (the "Staff") in determining whether there have been any violations of the federal securities laws, and the interest of the Company and the Board in analyzing the circumstances and people involved in the events at issue, the Company and the Board may provide to the Staff oral briefings and copies of certain documents ("Confidential Materials").

Please be advised that by producing the Confidential Materials pursuant to this Agreement, the Company and the Board do not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege applicable as to third parties. The Company and the Board believe that the Confidential Materials are protected

by, at a minimum, the attorney work product doctrine and the attorney-client privilege. The Company and the Board believe that the Confidential Materials warrant protection from disclosure.

The Staff will maintain the confidentiality of the Confidential Materials pursuant to this Agreement and will not disclose them to any third party, except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities.

The Staff will not assert that production by the Company or the Board of the Confidential Materials to the Commission constitutes a waiver of the protection of the attorney work product doctrine, the attorney-client privilege, or any other privilege applicable as to any third party. The Staff agrees that production of the Confidential Materials provides the Staff with no additional grounds to subpoena testimony, documents, or privileged materials or information from the Company or the Board or any of their outside professional advisors, although any such grounds that may exist apart from the production of Confidential Materials shall remain unaffected by this Agreement.

The Staff's agreement to the terms of this letter is signified by its signature on the line provided below.

By: /s/ William R. McLucas
WILLIAM R. MCLUCAS
Wilmer, Cutler & Pickering
Counsel for Qwest Communications International Inc.

AGREED AND ACCEPTED:
United States Securities and Exchange Commission

By: /s/ [Illegible]
Division of Enforcement

Date: February 11, 2003

APPENDIX F

HADDON, MORGAN. MUELLER. JORDAN,
MACKEY & FOREMAN. P.C.
ATTORNEYS-AT-LAW

Harold A. Haddon / Lee D. Foreman / Norman R. Mueller /
Saskia A. Jordan / Pamela Roblliard Mackey / Ty Gee / Rachel A. Bells /
Fredric M. Winocur / Kevin M. McGreevy / Bryan Morgan, Of Counsel

February 10, 2003

William J. Leone, Esq.
First Assistant United States Attorney
Office of the United States Attorney
1225 Seventeenth Street, Suite 700
Denver, Colorado 80202

Re: *IN THE MATTER OF QWEST COMMUNICATIONS INTERNATIONAL INC.*

Dear Mr. Leone:

Qwest Communications ("Company") and a committee of its Board of Directors are in the process of conducting an analysis of its accounting policies, its application of those policies to particular transactions, and various other matters related to Qwest's financial reporting. The Company and the Board have developed facts, data and underlying information in connection with this analysis. In light of the common interest of the Department of Justice ("DOJ") in determining whether there have been any violations of federal law, including the federal securities laws, and in light of the public interest in encouraging full cooperation by the Company and full assistance in investigating these matters, and the Company's and the Board's interests in investigating and analyzing the circumstances and people involved in the events at issue, the Company and the Board have provided and may in the future provide to DOJ oral briefings and copies of certain documents ("Confidential Materials").

Please be advised that by producing the Confidential Materials pursuant to this agreement, the Company and the Board do not intend to waive the protection of the attorney work product doctrine, attorney-client privilege; or any other privilege applicable as to third parties. The Company and the Board believe that the Confidential Materials are protected by, at a minimum, the attorney work product doctrine and the attorney-client privilege. The Company and the Board believe that the Confidential Materials warrant protection from disclosure.

DOJ will maintain the confidentiality of the Confidential Materials pursuant to this agreement and will not disclose them to any third party, except to the extent that DOJ determines that disclosure is otherwise required by law or would be in furtherance of DOJ's discharge of its duties and responsibilities. The Company and the Board acknowledge that DOJ may share the Confidential Materials with other State, Local and Federal agencies provided that such agencies agree to the terms of this agreement. In addition, DOJ may make direct or derivative use of the Confidential Materials in any proceeding and its investigation. Neither the Company nor the Board will assert any objection, claim or defense arising out of any inquiry or investigation arising from the direct use of Confidential Materials on the ground that such inquiry invaded or compromised any attorney client or work product privilege.

The DOJ will not assert that production by the Company or the Board of the Confidential Materials to the DOJ constitutes a waiver of the protection of the attorney work product doctrine, the attorney-client privilege or any other privilege applicable as to any third party. The DOJ agrees that it will not assert that either the Company or the Board has waived any applicable privilege with respect to any other documents or materials. Similarly, the Company and the Board agree that, by executing this agreement, the DOJ does not waive or

relinquish any of its rights to seek other or additional information, or to claim that grounds may exist apart from the production of Confidential Materials for obtaining such other or additional information.

DOJ's agreement to the terms of this letter is signified by your signature on the line provided below.

Sincerely,

/s/ Harold A. Haddon
HAROLD A. HADDON
For Qwest Communications International, Inc.

AGREED AND ACCEPTED:

United States Department of Justice

By /s/ William J. Leone
WILLIAM J. LEONE
First Assistant United States Attorney
District of Colorado

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No.06-1070

In re: QWEST COMMUNICATIONS INTERNATIONAL, INC.,
Securities Litigation,

Petitioner.

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Pursuant to the Court's Order of February 27, 2006, the United States Department of Justice respectfully submits this response to the petition for writ of mandamus filed by Qwest Communications International, Inc. ("Qwest").

1. The United States Department of Justice is Not a Party to the Discovery Dispute Before the Court.

This proceeding arises out of a consolidated federal securities class action filed against petitioner Qwest. The United States Department of Justice (the "Government") was not a principal party to that action.

The Government moved to intervene in the class action for the limited purpose of staying certain discovery unrelated to the allegedly privileged information that is the subject of this mandamus proceeding. The Government sought intervention because the civil action involves the same subject matter as an ongoing criminal investigation and pending criminal cases, and those proceedings might be impaired absent a limited stay of discovery in this case. *See* Exhibit 1: *Motion of Proposed Intervenor Plaintiff, United States Attorney's Office, District of Colorado to Intervene for the Limited Purpose of Seeking a Stay of Discovery and Memorandum Brief in*

Support (Docket Number 767-1). The magistrate judge overseeing discovery granted the motion of the United States Attorney's Office on August 17, 2005. *See* Exhibit 2: *Courtroom Minutes Dated August 17, 2005, Magistrate Judge Craig B. Shaffer.* That limited stay of discovery has remained in full force and effect except as modified by agreement of the parties and was recently reaffirmed by Magistrate Judge Shaffer following a hearing on February 22, 2006.

At no time during the course of this litigation has the Government been involved in, or taken a position on, the merits of the principal parties' discovery disputes or the legal questions at issue here. To the contrary, the Government has consistently taken the position in the district court that its participation in this civil case for the limited purpose of seeking a stay of discovery did not require or allow it to be heard on other matters and that the district court's orders concerning those other matters, including the alleged privileged status of any information produced by Qwest, would not be binding on the Government.[1]

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[1] As noted, the Government has consistently taken the position in the district court that its interests regarding privilege issues are independent of those of the principal parties, and that the district court's orders concerning those other matters, including the alleged privileged status of any information produced by Qwest, would not be binding on the Government. Because Qwest produced information pursuant to the Letter Agreements, the Government did not litigate the privilege issue in the district court. If the Government were required to litigate that issue, it might assert various grounds for obtaining the information including the crime-fraud exception. More importantly, the Letter Agreements would allow the Government to use the alleged privileged information as evidence in any such proceedings to determine the validity of that or any other exception, even though the Government could not assert that there had been a waiver by the mere act of producing the information to the Government in the first instance. Were the Government to be required to litigate the full scope of issues relating to Qwest's ability to withhold the Confidential Materials from production, the district court proceedings would become unduly complicated. Regardless of what happens in this

The Government does not seek to expand the scope of its participation in this case in this Court. However, the Government will highlight several facts that may be relevant to the Petition for a Writ of Mandamus.

2. The Federal Judicial Conference Advisory Committee on the Federal Rules of Evidence is Considering a Rule Change That Would Address This Subject.

The question of the effect and validity of limited or selective waivers of privileges in connection with disclosures to government investigative agencies is presently pending before the Federal Judicial Conference's Advisory Committee on the Federal Rules of Evidence, which is considering whether to propose an amendment to the Federal Rules of Evidence addressing that subject. The United States is currently studying the issue in light of and within the framework of the proposed rulemaking.

3. Although the Government Takes No Position on the Underlying Dispute Between the Parties, It Can Confirm Certain Facts That May Be Pertinent to the Court's Decision.

A. The United States Attorney's Office sought information from Qwest that it considered important to, and in some cases essential to, its criminal investigation.

B. Qwest advised the United States Attorney's Office that some of the information sought might be subject to claims of attorney-client or work-product privilege.

C. In order to facilitate and further the criminal investigation, Qwest agreed to produce information on certain topics without regard to whether it might be subject to a claim of privilege. That production was made pursuant to the terms

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proceeding between Qwest and the Plaintiffs, it is important that the result not impair the Government's right to litigate the issue, if necessary, in a proper forum, such as a subpoena enforcement action.

of certain letter agreements ("the Letter Agreements"). Four such agreements are the agreements of February 10, 2003, April 15, 2003, August 29, 2005, and October 13, 2005.[2]

D. The Letter Agreements provide that the United States Attorney's Office will "maintain confidentiality of the Confidential Materials" and will "not disclose them to any third party, except to the extent . . . that disclosure is otherwise required by law or would be in furtherance of DOJ's discharge of its duties and responsibilities." *See* Mandamus Petition Exh. C; *accord* Exh. B. The Letter Agreements further provide that the DOJ will "not assert that production by [Qwest] of the Confidential Materials constitutes a waiver of the protection of the attorney work product doctrine, the attorney-client privilege, or any other privilege applicable as to any third party." *See* Exh. C; *accord* Exh. B.

E. The April 15, 2003, August 29, 2005, and October 13, 2005 Letter Agreements clarify the scope of right of the United States Attorney's Office to use the information and permit the Office to "make full use of any information it obtains under this agreement in any lawful manner in furtherance of its investigation, including without limitation, analyses, interviews, grand jury proceedings, court proceedings, consultation with and support of other federal, state or local agencies, consultations with experts or potential experts, and the selection/retention of testifying experts." Those Letter Agreements also enable the United States Attorney's Office to interview board members, in-house lawyers, outside lawyers and Qwest executives about attorney-client communications and to make derivative use of information obtained as a result of those interviews. The Letter Agreements do not require the United States Attorney's Office to segregate mate-

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[2] The United States Attorney's Office attaches hereto the April 15, 2003 agreement, the August 29, 2005 agreement, and the October 13, 2005 agreement for the convenience of the Court. *See* Exhibits 3, 4, and 5.

rial obtained from Qwest, file it under seal, keep records of its use, or otherwise deal with the information in any special way.

F. The information produced has been useful for, and in some cases essential to, the United States Attorney's Office's criminal investigation.

G. The United States Attorney's Office has used the information provided by Qwest in many ways. Since the United States Attorney's Office does not track, and is not required to track, each bit of information obtained to determine whether it has been identified as privileged, it has not attempted to calculate the quantity of information that has been further disseminated to third parties. However, the United States Attorney's Office has introduced certain documents containing legal advice into evidence in a criminal trial, called certain attorneys as witnesses at trial, interviewed in-house and outside attorneys, and produced much of the alleged privileged information as discovery in the three separate criminal prosecutions resulting from its investigation. In addition, many of the alleged privileged documents were made exhibits to SEC investigative testimony and discussed during such testimony. That testimony and those exhibits have been produced by the United States Attorney's Office as part of its criminal discovery.

4. Conclusion.

The Government is not a party to the discovery dispute before the Court, and respectfully takes no position on whether a writ of mandamus is appropriate under the circumstances.

Respectfully submitted,

WILLIAM J. LEONE
United States Attorney

/s/ William J. Leone
WILLIAM J. LEONE
1225 17th Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0100
Email Address:
USACO-ECFAppellate@usdoj.gov
Attorneys for the Government

CATHERINE Y. HANCOCK
Attorney, Appellate Staff
Civil Division, Room 7236
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
Telephone: (202) 514-3469
Email Address:
Catherine.Hancock@usdoj.gov

MICHAEL S. RAAB
Attorney, Appellate Staff
Civil Division, Room 7236
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
Telephone: (202) 514-4053
Email Address:
Michael.Raab@usdoj.gov

Supreme Court, U.S.
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OCT 11 2006
OFFICE OF THE CLERK

(2)

No. 06-343

IN THE

Supreme Court of the United States

QWEST COMMUNICATIONS INTERNATIONAL INC.,
Petitioner,

v.

NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, CLIFFORD MOSHER, TEJINDAR SINGH AND SAT PAL SINGH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHUMAN & BERENS LLP
KIP B. SHUMAN
JEFFREY A. BERENS
801 East 17th Avenue
Denver, CO 80218-1417
(303) 861-3003

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
MICHAEL J. DOWD
SPENCER A. BURKHOLZ
THOMAS E. EGLER
JOSEPH D. DALEY *
X. JAY ALVAREZ
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

* Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether this Court should grant certiorari to approve a litigant's "selective waiver" of ostensibly privileged documents, when (1) a thorough review of the circuit courts "indicates there is almost unanimous rejection of selective waiver," App. 13a, (2) the appellate court's ruling here turned upon a fact-bound, unique record, and (3) even if selective waiver were deemed desirable, legislative or rule-making bodies are the more-appropriate avenues within which to pursue the evidentiary concept.

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IN THE

Supreme Court of the United States

No. 06-343

QWEST COMMUNICATIONS INTERNATIONAL INC.,
Petitioner,

v.

NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, CLIFFORD MOSHER, TEJINDAR SINGH AND SAT PAL SINGH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Qwest's Petition asks this Court to review the unsurprising result of a fact-bound scenario: Despite knowing of overwhelming authority against its actions, Qwest attempted to employ a "selective waiver" by handing over to federal agencies more than 220,000 pages of ostensibly privileged documents—while insisting that those same documents remained privileged in a separate private action brought by Respondents.[1] Not surprisingly, the Tenth Circuit joined the

[1] Petitioner throughout its Petition uses the benign-sounding term "limited waiver" to describe its deliberate waiver of formerly privileged mate-

majority view rejecting selective waiver, and held that Qwest's gamble had failed.

Certiorari review is not warranted to correct Qwest's losing litigation bet. The circuit courts that have considered the issue are virtually unanimous in their rejection of selective waiver. Moreover, the Tenth Circuit took pains to explain numerous times that it was the fact-intensive *record before it* that resulted in its holding. Finally, the availability of some form of selective waiver in connection with government investigations—because it deals with evidentiary privileges—is better left for Congress to decide, as provided by 28 U.S.C. §2074(b).

The Petition should be denied.

STATEMENT OF THE CASE

Qwest shareholders ("Respondents") brought the underlying federal securities fraud class action in August 2001 against Qwest ("Petitioner") and various other defendants. The shareholders alleged that by making false and misleading statements concerning Qwest's financial results and business conditions, defendants violated federal securities laws including §§10(b), 20(a), and 20A of the Securities Exchange Act of 1934, and §§11 and 15 of the Securities Act of 1933.

Federal authorities also suspected something was amiss. In early February 2002, Qwest received a subpoena from

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rials. Respondents will use the term "selective waiver" in this Opposition, however, as (a) that is the term used throughout the Tenth Circuit's opinion that is the subject of the Petition, and (b) it is frankly more accurate. *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991) (declining to use term "limited waiver rule," because it actually encompasses "two distinct types of waivers"—either "partial" or "selective"—and the latter more accurately describes situations in which a party "who has disclosed privileged communications to one party [attempts] to continue asserting the privilege against other parties").

the Los Angeles regional office of the Securities and Exchange Commission ("SEC"), seeking documents pertaining to Qwest's business dealings with bankrupt telecom corporation Global Crossing. By March 8, 2002, the SEC's regional office in Denver had begun an informal inquiry into Qwest's accounting. A month later, the SEC upgraded that inquiry to a formal investigation. In early July 2002, the U.S. Attorney's Office for the District of Colorado informed Qwest that it had commenced a criminal investigation of the company. (Later, it became clear that the criminal investigation's scope mirrored the SEC probe's.[2]) In late July 2002, Qwest announced that it would restate its reported financial results for 1999, 2000, and 2001. Qwest's stock price, which had at one time reached $57 per share, plummeted to around $1 per share by mid-2003.

In the face of the foregoing, Qwest agreed to cooperate—somewhat—with the SEC and DOJ investigations. Utilizing a series of letter agreements (the "Agreements") with the two government agencies spanning February 2003 through late 2005, Qwest agreed to provide the SEC and DOJ with certain documents (the "Confidential Materials") that Qwest claimed were otherwise protected under either attorney-client privilege or the work-product doctrine.

The Agreements' terms, as the Tenth Circuit Court of Appeals later explained, did little to prevent the agencies from further disseminating the materials to outside third parties. App. 27a-28a. For example, the February 11, 2003, Agreement between the SEC and Qwest specified that SEC staff would maintain the documents' confidentiality, "except

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[2] The United States Attorney in Denver told the Tenth Circuit Court of Appeals, in the underlying mandamus briefing, that Respondents' civil action against Qwest involves the same subject matter as the DOJ's ongoing criminal investigation and pending criminal cases. *See* the Department of Justice's ("DOJ") "Response to Petition for Writ of Mandamus" (hereafter "DOJ Response") at App. 73a.

to the extent that the Staff determines that disclosure is otherwise required by law *or would be in furtherance* of the Commission's discharge of its duties and responsibilities."[3] App. 69a. Qwest entered a similar February 10 Agreement with the DOJ, agreeing that the DOJ could "*share* the Confidential Materials with other State, Local and Federal agencies." App. 71a. On April 15, 2003, the DOJ and Qwest penned an even-more-expansive Agreement—this time specifying that the DOJ could make "full use of any information" it obtained via the Agreements "in furtherance of its investigation, *including, without limitation*, analyses, interviews, grand jury proceedings, court proceedings, [and] consultation with and support of other federal, state or local agencies."[4] The DOJ could even use the documents in "consultations with experts, or potential experts, and the selection and/or retention of testifying experts." As the U.S. Attorney in Denver later acknowledged, the Agreements did "*not require* the United States Attorney's Office to segregate material obtained from Qwest, file it under seal, keep records of its use, or otherwise deal with the information in any special way." App. 76a-77a. Indeed, the U.S. Attorney had not even "calculate[d] the quantity" of Confidential Materials "that has been further disseminated to third parties." *Id.* at 77a.

Pursuant to those Agreements, Qwest ultimately handed over to the government—but later refused to produce to Respondents in discovery—more than 220,000 pages of documents that it said were otherwise protected by either the attorney-client privilege or work-product doctrine. Notably, despite its purported desire to cooperate with the DOJ and SEC investigations, Qwest *still withheld* from the government

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[3] Emphasis is added throughout unless otherwise noted.

[4] The April 15, 2003, Agreement was attached as Ex. 3 to the DOJ Response, but is not reproduced in the Appendix.

another 390,000 pages of documents—based on attorney-client privilege and/or the work-product doctrine.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT COURTS ARE NOT IN DISARRAY ON THE QUESTION OF SELECTIVE WAIVER

Petitioner asserts that the circuit courts are hopelessly confused as to the availability of selective waiver. Petition at 7-11. But what Petitioner describes as a "kaleidoscope of different approaches and different outcomes," *id.* at 11, is actually a uniform prism of privilege law, through which stream various facts leading to case-specific results.

The Tenth Circuit pointed out this uniformity, explaining that while the concept of selective waiver was one of first impression there, "[o]ur review of the opinions of other circuits, however, indicates there is almost unanimous rejection of selective waiver." App. 13a; *see also* 6 James Wm. Moore, et. al., *Moore's Federal Practice* §26.49[5][g], at 26-184.10 (3d ed. 2006) ("The preferred view rejects the doctrine of selective waiver."). Indeed, "[o]nly the Eighth Circuit has adopted selective waiver in circumstances applicable to [Petitioner]." App. 13a.[5]

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[5] Indeed, Petitioner references a May 15, 2006, Memorandum from the Chair of the Advisory Committee on Evidence Rules to the Chair of the Standing Committee on Rules of Practice and Procedure, at page 23 n.14 of its Petition, that acknowledges selective waiver's disfavored status. While introducing Proposed Rule of Evidence 502, that Memorandum explains that "[m]ost federal courts have held that such a disclosure constitutes a waiver of the privilege, i.e., *the courts generally reject the concept* that a selective waiver is enforceable." *See* Page Two of the Memorandum from Jerry E. Smith, Chair of the Advisory Committee on Evidence Rules, to David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (revised June 30, 2006) (on file with author), *available at* http:// www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.

And the Eighth Circuit *is* the lone outlier when it comes to allowing selective waiver of attorney-client privileged materials. In *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc), the defendant corporation in a civil proceeding claimed attorney-client privilege protection for some materials prepared by its counsel that it had handed over to the SEC in a separate, nonpublic investigation. *Id.* at 611. Although it is long-settled that the attorney-client privilege is lost if the client discloses the substance of otherwise privileged communications to a third party, *see, e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), the Eighth Circuit held otherwise based on a dubious policy rationale: The court believed that a selective waiver was appropriate under the circumstances, or else corporations might be reluctant to employ "outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Diversified Indus.*, 572 F.2d at 611. That bare sentence was the sum and substance of its analysis of the issue.[6]

Many other circuits that considered the issue in more depth, including the First, Second, Third, Fourth, Sixth, and D.C.—and now the Tenth—have since rejected the notion that a litigant can pick and choose to whom it wishes to divulge attorney-client privileged information while retaining the privilege as to others. *See, e.g.*, *United States v. Mass. Inst. of Tech.* ("*M.I.T.*"), 129 F.3d 681, 686 (1st Cir. 1997); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *Westinghouse*, 951 F.2d at 1425; *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002); *In re Qwest Commc'ns Int'l*, 450 F.3d 1179,

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[6] The *Diversified Indus.* opinion was described recently as having "but a paragraph of analysis as its birthright, no Circuit siblings, and moreover, is probably an orphan in its own home." *In re Lupron Mktg. & Sales Practices Litig.*, 313 F. Supp. 2d 8, 12 (D. Mass. 2004).

1192 (10th Cir. 2006) (reprinted at App. 1a-40a); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *see also Genentech, Inc. v. United States ITC*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (acknowledging *Diversified Indus.*'s selective waiver, but noting "[t]his court, however, has never recognized such a limited waiver").[7]

Each circuit's rejection of selective waiver heeded the attorney-client privilege's underlying rationale: that its "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Thus, the Second Circuit noted that a party's "claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes." *John Doe Corp.*, 675 F.2d at 489. Similarly, the Third Circuit explained that "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Westinghouse*, 951 F.2d at 1425. The other circuits are in accord. *See, e.g.*, *Columbia/HCA Healthcare*, 293 F.3d at 302 ("any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage'") (citation omitted); *Permian*, 665 F.2d

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[7] *Genentech* did not present the issue of a selective waiver in circumstances resembling those here, but rather a waiver following inadvertent production of privileged materials. 122 F.3d at 1417. That said, the panel's comment illustrates yet another circuit's disapproval of selective waiver.

at 1221 n.13 ("Unlike the Eighth Circuit, we cannot see how 'the developing procedure of corporations to employ independent outside counsel to investigate and advise them' would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality.") (citation omitted).

A majority of the circuits to have considered the issue similarly reject selective waiver of non-opinion, or "fact," work product.[8] Ironically, among those myriad circuits is the Eighth Circuit, which in 1978 had created the concept of selective waiver for *attorney-client* privilege in its *Diversified Indus.* opinion. App. 19a-20a. Some ten years later the Eighth Circuit *rejected* selective waiver in the context of fact work product. *See In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 845 (8th Cir. 1988). Chrysler had produced a computer tape containing work product to *its adversaries* in a civil litigation settlement pursuant to a confidentiality agreement, yet tried to withhold the same materials from the U.S. Attorney. *Id.* at 845. After determining that the tape was not opinion work product, the Eighth Circuit held that "Chrysler waived any work product protection by voluntarily disclosing the computer tape to its adversaries . . . during the due diligence phase of the settlement negotiations." *Id.* at 846. The non-waiver/confidentiality agreement Chrysler entered into with the class-action plaintiffs was irrelevant; the crucial fact was that Chrysler had not kept its computer tape confidential. *Id.* at 847.

Several other circuits, including the First, Third, Fourth, Sixth—and now, the Tenth—are in accord. *See, e.g.*, *M.I.T.*, 129 F.3d at 687 ("prevailing rule [is] that disclosure to an adversary, real or potential, forfeits work product protection"); *Westinghouse*, 951 F.2d at 1429 (attempted selective

[8] Respondents agree that any waiver of "opinion" work product is not at issue in the Petition. Petition at 6 n.3.

waiver as part of ostensible cooperation with government is "foreign to the objectives underlying the work-product doctrine"); *Martin Marietta*, 856 F.2d at 625 ("disclosure by Martin Marietta to the federal government, the United States Attorney and the DOD, when the government and Martin Marietta were adversaries," comprised waiver of non-opinion work product); *Columbia/HCA Healthcare*, 293 F.3d at 307 (rejecting work product selective waiver as improper strategic tool); App. 24a ("having considered the purposes behind . . . the work-product doctrine as well as the reasoned opinions of the other circuits," selective waiver is unavailable).

Two circuits have left open the *possibility* of a selective waiver of non-opinion work product, but only under circumstances not present here. Although the D.C. Circuit, in *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), declined to retain the work-product protection of documents a company had previously made available to the SEC, *id.* at 824, it noted there was no evidence that the company had "ever reached an explicit agreement with the SEC" not to disclose the materials to third parties. *Id.* at 820. Thus, that circuit intimated that such an "*explicit*" agreement under the right circumstances *might* justify a selective waiver. *Id.* at 824 (hypothesizing that government agencies "could expressly agree to any limits on disclosure to other agencies"). Similarly, the Second Circuit held that litigants had waived a memorandum's work-product protection by disclosing it to the SEC, but merely declined "to adopt a per se rule that all voluntary disclosures to the government" must always work a waiver. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993). The Second Circuit thought that a *per se* rule would not cover situations in which the SEC and disclosing party had entered into "an *explicit* agreement that the SEC *will maintain the confidentiality* of the disclosed materials." *Id.*

As explained more fully *infra* in Section II, the Agreements at issue here were anything but "explicit," tightly

woven instruments designed to keep privileged materials out of third parties' hands. To the contrary, they were non-specific and porous, giving both the DOJ and SEC broad discretion to disclose and disseminate the materials to third parties—provided it was in "furtherance" of the government investigators' duties. "[A]ny restrictions on their use were loose in practice." App. 27a. Faced with such wide-open agreements, no doubt even the D.C. and Second circuits would reject the availability of a selective waiver.

Given the foregoing, Petitioner's asserted "confusion" among the federal appellate courts is illusory. It is doubtful the various circuits would reach a different result if presented with the same or similar facts, and this Court's intervention *in this case* is not needed to iron out whatever minor differences may exist between them. A far better course would be to allow the circuits to continue their refinement of the concept's availability in discrete situations.[9]

II. CERTIORARI IS ALSO UNWARRANTED BECAUSE THE TENTH CIRCUIT DECIDED THE ISSUE BASED UPON A FACT-INTENSIVE RECORD UNIQUE TO THIS CASE

Petitioner accuses the Tenth Circuit of "adher[ing] to a rigid dogma" and broadly "holding that disclosure of privileged information to the government waives privileges and work product protections to the universe at large," Petition at

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[9] *See Brown v. Texas*, 522 U.S. 940, 118 S. Ct. 355, 357 (1997) (Stevens, J.) (writing on denial of certiorari that "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court'") (citation omitted); *see also* Samuel Estriecher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. 681, 716 (1984) ("[t]he process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule").

17, but even a cursory reading of the panel's opinion belies the accusation. The Tenth Circuit did not issue a sweeping, blanket holding; rather, no fewer than 15 times did the panel emphasize that it was the *record in this case* driving its conclusion. *See, e.g.*, App. 24a ("we conclude the record in this case is not sufficient to justify adoption of a selective waiver"); App. 25a ("The record before us, however, does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine."); App. 26a ("The record is equally deficient concerning whether the DOJ and the SEC may have independently gained access to the Waiver Documents by invoking other means or theories . . . .").

That fact-intensive record ordained the result here.

Petitioner insisted, for example, that selective disclosure was needed in order to facilitate "cooperation" with government investigators. App. 24a. But the Tenth Circuit easily recognized that the record did not support that contention. "Most telling" was Qwest's disclosure of protected materials "in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances, and despite the absence of Tenth Circuit precedent." App. 25a.[10] Moreover, the "record is equally deficient" concerning whether the government agencies "may have independently gained access to the Waiver Documents by invoking other means or theories, such as the crime or fraud exception." App. 26a. Indeed, the

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[10] Other circuits are in accord. *See, e.g.*, *Steinhardt Partners*, 9 F.3d at 236 ("that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine"); *Westinghouse*, 951 F.2d at 1426 ("[W]e do not think that a new privilege is necessary to encourage voluntary cooperation with government investigations. . . . We find it significant that Westinghouse chose to cooperate despite the absence of an established privilege[] protecting disclosures to government agencies.").

DOJ had raised that very possibility in its mandamus briefing. *Id.* And, if selective waiver "were as essential to government operations as Qwest claims," one would have expected the DOJ to support Qwest's position. *Id.* Instead, in its mandamus briefing, the DOJ "carefully took no position on the parties' dispute." *Id.* "It would appear, then, that the government's interest is not as Qwest portrays it." *Id.*[11]

Notably, Qwest's supposed "cooperation" with the government was half-hearted at best—and deliberately calculating at worst. Despite handing over 220,000 pages of documents it asserted were protected by either attorney-client privilege or the work-product doctrine, Qwest *withheld another 390,000 documents* from the government—on privilege grounds! App. 30a. Thus, Qwest deliberately "hedged its bets" by choosing to release some privileged documents while retaining others, *id.*, and patently undermined its position that the shield of selective waiver is necessary in order to ensure cooperation. With its actions, Qwest vividly illustrated that its selective waiver served no underlying policy, but was a strategy designed to allow Qwest to pick and choose among its opponents—improperly "waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others." *Permian*, 665 F.2d at 1221; *accord* Moore, *supra*, §26.49[5][g]. Such gamesmanship is abhorrent to the animating principles behind evidentiary privileges.[12]

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[11] Plus, the "culture of waiver" that Petitioner decries (Petition at 22) seems to be lessening, as evidenced by the Sentencing Commission's recent promulgation of an amendment that deletes language in the Sentencing Guidelines that "could be misinterpreted to encourage waivers." *Sentencing Guidelines for United States Courts*, 71 Fed. Reg. 28063, 28073 (May 15, 2006). The amendment will take effect on November 1, 2006, unless Congress intervenes. *Id.* at 28063; App. 38a.

[12] *See also Columbia/HCA Healthcare*, 293 F.3d at 307 (selective waiver cannot be used "to transform the work product doctrine into another 'brush on the attorney's palette,' used as a sword rather than a shield")

Moreover, the record demonstrates that the Agreements were full of holes. True, by their terms Qwest asked the DOJ and SEC to maintain the confidentiality of the formerly privileged documents—but only within the limits set forth by the Agreements themselves. *See, e.g.*, App. 69a ("The Staff will maintain the confidentiality of the Confidential Materials pursuant to this Agreement . . . ."). And those limits were set far beyond the government agents' eyes only, allowing disclosure to other government agencies—*and even to civilian third parties*. For example, the April 15, 2003, Agreement specified that the DOJ could make "full use of any information" it obtained under the Agreements in furtherance of its investigation,

> *including, without limitation*, analyses, *interviews*, grand jury proceedings, court proceedings, consultation with and support of other federal, state or local agencies, *consultations with experts, or potential experts*, and the selection and/or retention of testifying experts.

Ex. 3 to DOJ Response, at 1. As plaintiffs' counsel noted at the Tenth Circuit oral argument on the mandamus petition, the Agreement's plain terms would allow the government to box up all 220,000 documents and ship them to outside accounting experts—utterly destroying any protections the documents may have had. The U.S. Attorney in Denver readily acknowledged that the Confidential Materials had not been kept confidential:

> [T]he United States Attorney's Office has introduced certain [Qwest] documents containing legal advice into

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(citation omitted); *Sealed Case*, 676 F.2d at 825 ("where lawyer and client attempt to manipulate the work product privilege . . . the cause of justice compels disclosure, and a waiver is implied"); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) ("A client cannot waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial.").

> evidence in a criminal trial, called certain attorneys as witnesses at trial, interviewed in-house and outside attorneys, and produced much of the alleged privileged information as discovery in the three separate criminal prosecutions resulting from its investigation. In addition, many of the alleged privileged documents were made exhibits to SEC investigative testimony and discussed during such testimony.

App. 77a. Nor did the Agreements require the government "to segregate material obtained from Qwest, file it under seal, keep records of its use, or otherwise deal with the information in any special way." App. 76a-77a. Indeed, the U.S. Attorney "has not attempted to calculate the quantity" of Confidential Materials "that has been further disseminated to third parties." *Id.* at 77a.

Before the Tenth Circuit, Qwest even conceded that "*it is unknown* how many or which of the Waiver Documents the agencies have used or disclosed, how those uses or disclosures occurred, *who might have had access to the Waiver Documents, and the extent of continuing disclosures.*" App. 27a; *id.* at 28a ("At oral argument, Qwest essentially conceded that those *widely distributed* Waiver Documents have lost any protection they once enjoyed.").

Given those concessions and the flimsy protections the Agreements provided, the Tenth Circuit's holding is both unsurprising and undeserving of this Court's review.

III. THE AVAILABILITY OF SELECTIVE WAIVER IN CONNECTION WITH GOVERNMENT INVESTIGATIONS IS BETTER LEFT FOR CONGRESS TO DECIDE

Petitioners assert that *Proposed* Rule of Evidence 502, which suggests enacting some form of selective waiver, shows both the importance of and the merits of its position. Petition at 23-25. Ironically, however, that the Rule has even been

proposed undermines Petitioner's argument that this Court's premature intervention is necessary, and further militates against certiorari review here.

First, that the Advisory Committee on Evidence Rules has even proposed such a rule shows that there was no such selective waiver in existence generally when Qwest first decided to gamble by handing over privileged documents only to one set of adversaries. "[I]n the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances," App. 25a, Qwest rolled the dice and lost. *See also id.* at 30a ("It is difficult to understand how a rejection of selective waiver will work an unfairness on Qwest when Qwest disclosed the Waiver Documents in the face of the known threat from Plaintiffs, the absence of Tenth Circuit precedent, and a dearth of favorable circuit authority."). Certiorari should not be granted simply to undo a losing litigation gamble.

Second, as Petitioner points out, because the proposed Rule would affect evidentiary *privileges*, by statute it must be enacted by Congress. Petition at 24 n.15; *see also* 28 U.S.C. §2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."). In other words, rules affecting evidentiary privileges occupy such a rarified place in our legal system that the ultimate responsibility for their promulgation is reserved to the legislative branch. *In re Grand Jury Proceedings*, 103 F.3d 1140, 1155 (3d Cir. 1997) (Congress "has recognized the importance of privilege rules insofar as the truth-seeking process is concerned. . . . It did so by identifying and designating the law of privileges as a special area meriting greater legislative oversight.").

This makes sense, as legislatures and rule-making bodies, more so than courts applying (or creating) common law, "are endowed with tools to marshal evidence, facts, and experience from numerous and diverse sources that can support

more dramatic and immediate creation of new rules or modifications of old rules." App. 39a. Thus, whether a nationwide evidentiary privilege rule allowing for selective waiver is regarded as a "new" rule, or merely a gloss on existing evidentiary rules, it is of sufficient importance that it is rightly reserved to Congress. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (rejecting a proposed journalists' privilege against compelled testimony, and noting Congress's "freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary"); *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (rejecting proposed privilege for peer review materials, while explaining that the "balancing of conflicting interests of this type is particularly a legislative function"); *M.I.T.*, 129 F.3d at 685 (rejecting selective waiver while explaining that "such agencies usually have means to secure the information they need and, if not, can seek legislation from Congress"). Given the foregoing, it makes more sense for this Court to let the rule review/comment and legislative enactment process work out.

Finally, it is doubtful that the precise issue raised by Petitioner and its uniquely porous Confidentiality Agreements will trouble the lower courts. Either Proposed Rule of Evidence 502 will eventually rule the day or, in its absence, the circuits will continue to hew to the clear majority trend against selective waivers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SHUMAN & BERENS LLP
KIP B. SHUMAN
JEFFREY A. BERENS
801 East 17th Avenue
Denver, CO 80218-1417
(303) 861-3003

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
MICHAEL J. DOWD
SPENCER A. BURKHOLZ
THOMAS E. EGLER
JOSEPH D. DALEY *
X. JAY ALVAREZ
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

* Counsel of Record

Counsel for Respondents

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